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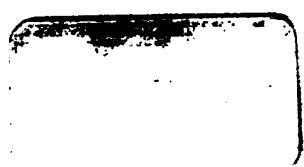
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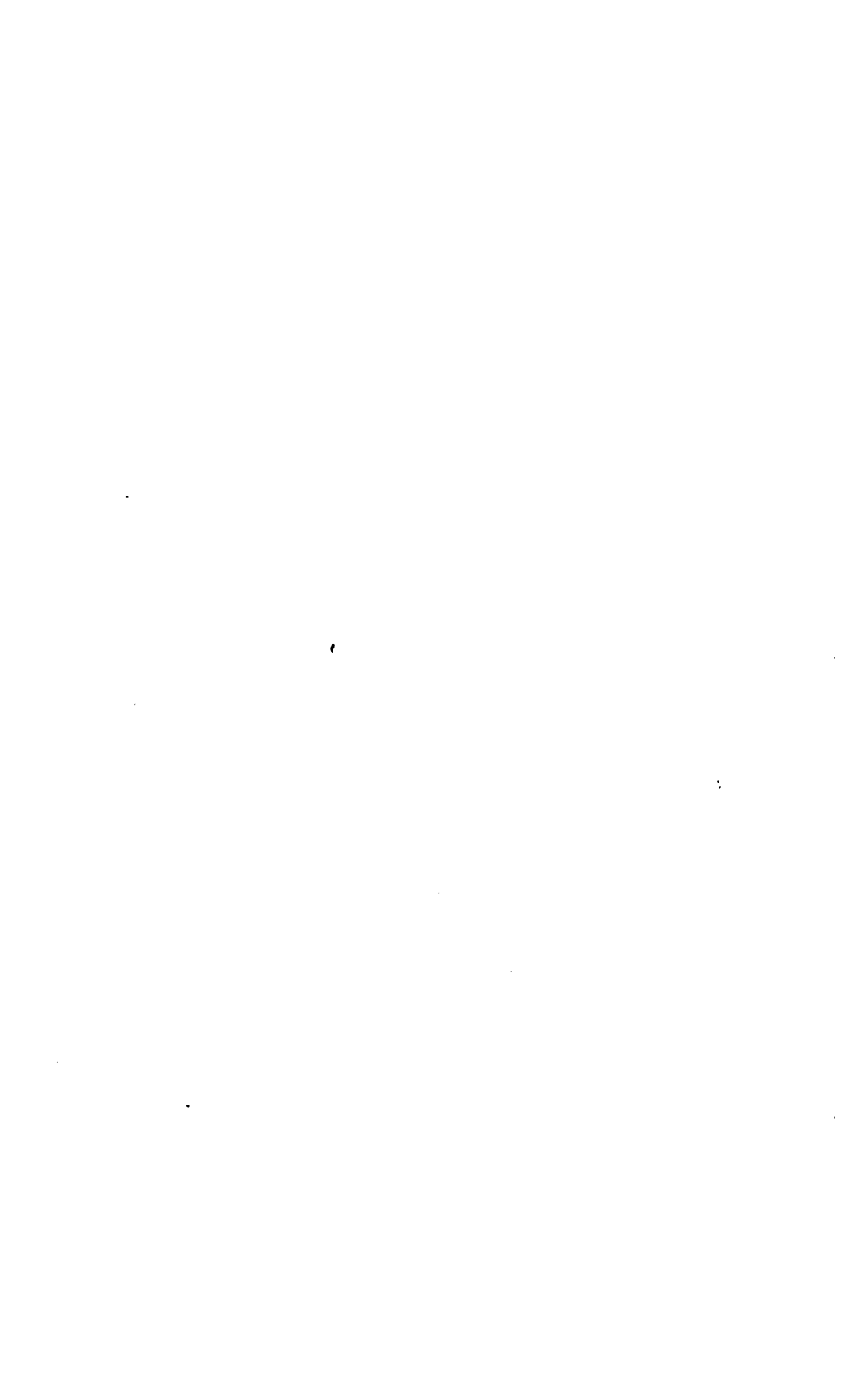
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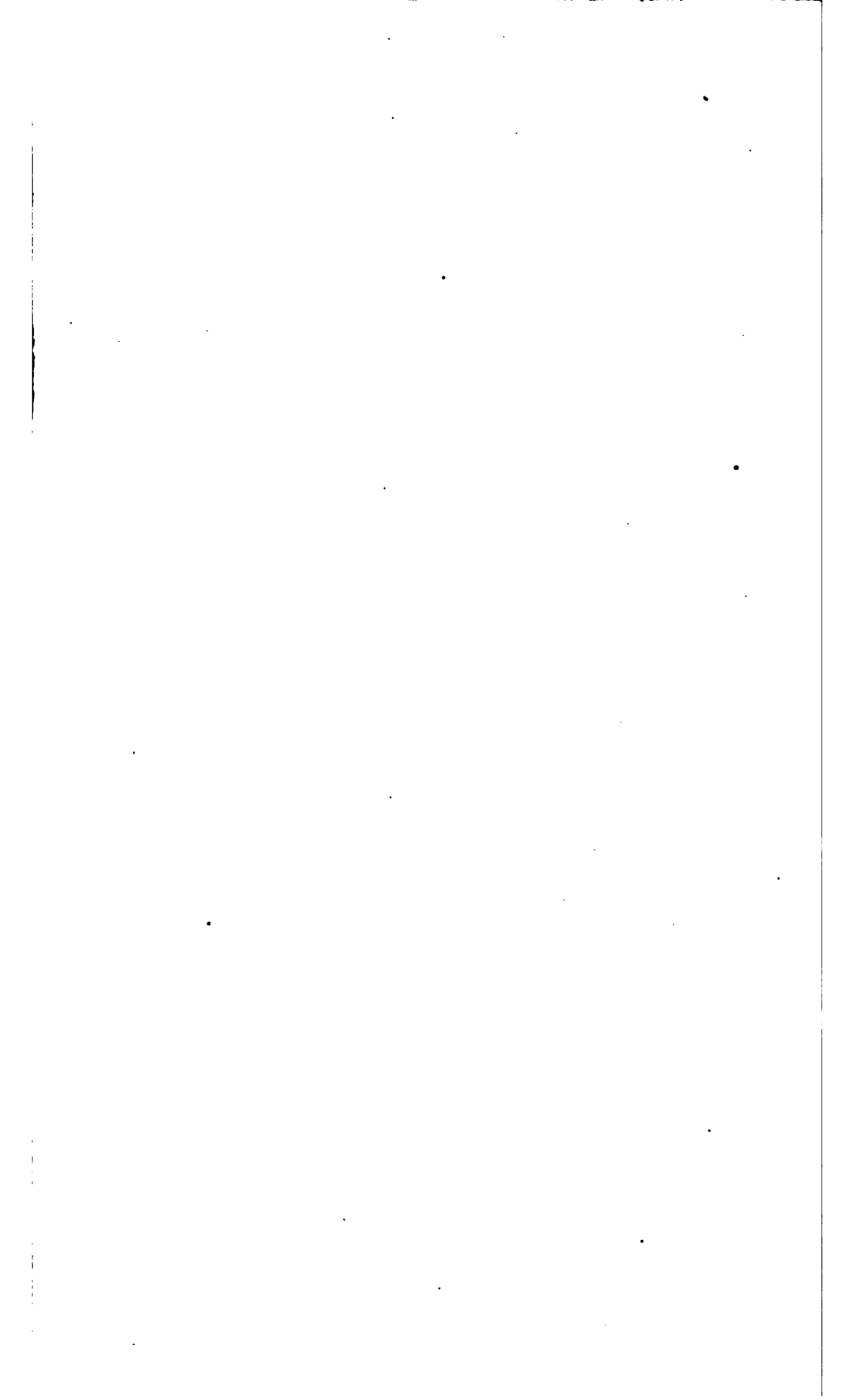
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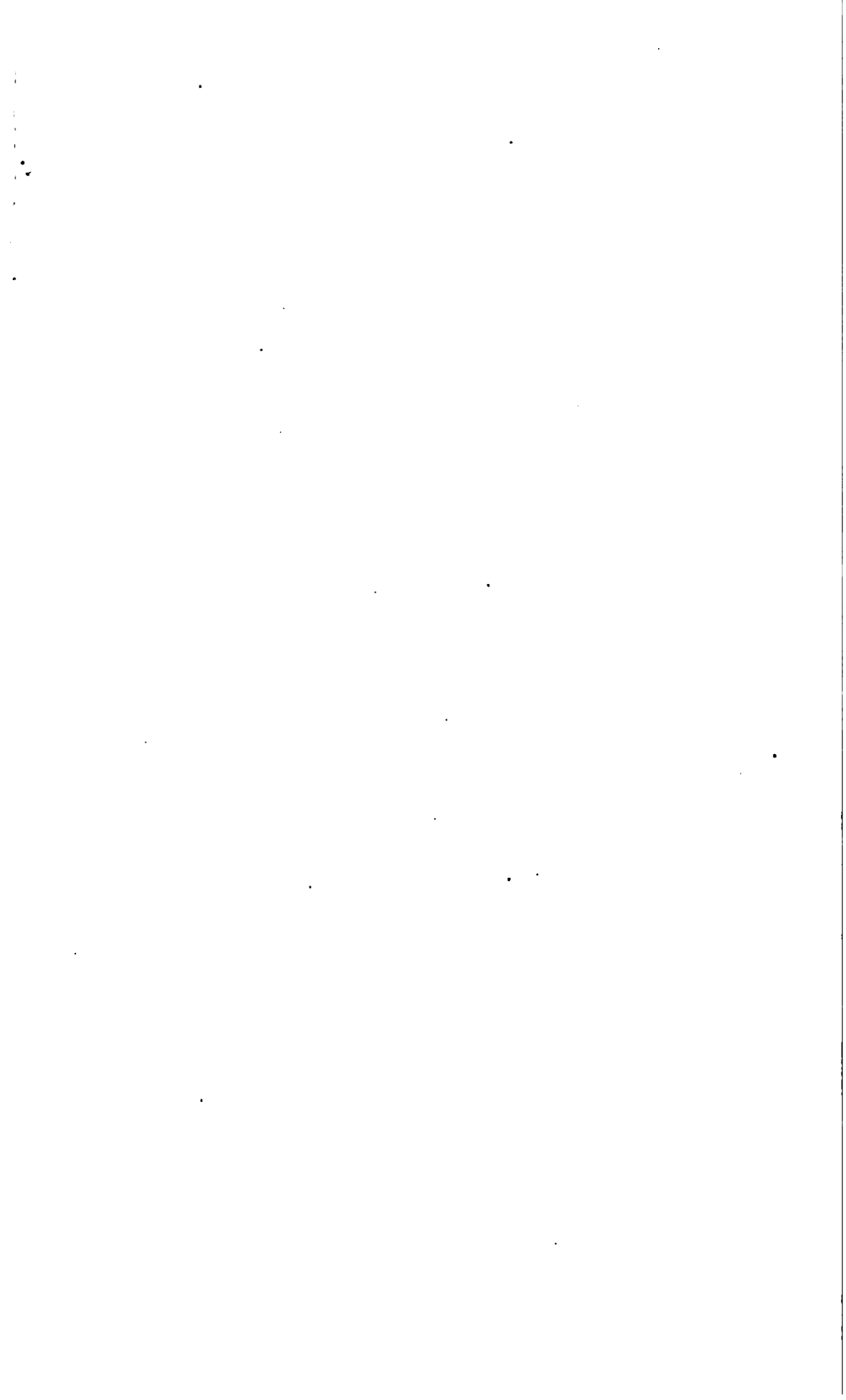












James T. Mitchell
CASES *Nov. 1871.*

IN THE

CIRCUIT COURT

OF

THE UNITED STATES,

FOR THE THIRD CIRCUIT.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. III.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 535 CHESTNUT STREET.

1871.

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BAIRD v. BYRNE.

[JURISDICTION: NATURALIZATION: FOREIGN ALLEGIANCE.]

A mere "declaration of intention" by an alien, under the naturalization laws of the United States, to become a citizen, &c., and to renounce all allegiance to a foreign, his natural sovereign, in a judicial point of view, is not sufficient, of itself, and without being perfected by an actual renunciation to prevent such alien from being regarded as a "foreign citizen or subject," within the meaning of that clause of the Constitution which gives jurisdiction to the courts of the United States over controversies between the citizens of a State and "foreign citizens or subjects." This point ruled at *nisi prius*, in a special case, and with the expression of a readiness on the part of the court to hear it more solemnly argued.

By the act of Congress, on the subject of naturalization,* any alien, being a free white person, may become a citizen of the United States by declaring before certain courts prescribed by the act, his *bond fide intention* to become such citizen, "and to *renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly by name the prince, potentate, state or sovereignty whereof such alien may at the time be a citizen or subject;*" and then at the expiration of three years, under certain provisos, making oath to support the Constitution of the United States, and that he doth absolutely and entirely renounce and abjure such allegiance, &c.

With this law in force, Byrne, the defendant, a native of Ireland, came to this country in the spring of 1849, and immediately, on the 7th of April of that same year, made in the proper court the required declaration of his *intention*, and particularly of his

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*Act of April
14th, 1802, ch.
28, §1.

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intention to renounce his allegiance to the Queen of Great Britain and Ireland. Soon afterwards he took up his abode in Philadelphia, where, with his father, he continued to reside. In 1853 he was elected captain of a volunteer company of Philadelphia troops, and as such was commissioned by the Governor of Pennsylvania, and he frequently and uniformly declared, and this with emphasis and warmth, that he had thrown off his allegiance and ceased to be a subject to the Queen of Great Britain and Ireland. He was thus residing here when, in April, 1853, this suit was brought by Baird, a citizen of Pennsylvania, before the expiration of the term of residence required by law as precedent to the final act of naturalization.(A)

*Art. III., Sec.
2, ¶ 1.

“The judicial power” of the United States courts extending by the Constitution* to controversies between the citizens of a State, and *foreign* States, *citizens or subjects*, the question in this case, which arose on a plea to the jurisdiction, was whether the defendant was, when the suit was brought, a *foreign subject*, and as such within the jurisdiction of the United States courts; or, in other words, whether a person born in a foreign country, and owing allegiance to its sovereign, who emigrates to this country with the intention of becoming a citizen, can by his voluntary act, without the concurrence of his native government, throw off his allegiance, so as to cease to be a *foreign subject*, after he has made his declaration on oath of his intention to renounce that allegiance, and before the final act of naturalization.

(A) On the expiration of the proper term, Byrne actually became a citizen; but on the breaking out of the war between Great Britain and Russia he went abroad, without any intention of returning to the United States, and entered into the military service of the Emperor of Russia.

Mr. Penrose, for the defendant, Byrne.

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I. The Circuit Court is of limited jurisdiction, having cognizance only in a few cases. So strictly have the United States courts been confined within the limits prescribed, that it has been held, under the provision that the court shall have jurisdiction in controversies between citizens of different States, that neither the District of Columbia, nor a Territory, is a State within the meaning of the Constitution.* Assuming, then, that if Byrne was, at the time of the commencement of this suit, not a subject of the Queen of Great Britain, this court had no jurisdiction, let us inquire :

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against the
jurisdiction.

*Seton v. Han-
ham, Charl-
ton's R. 374 ;
Hepburn v.
Ellzey, 2
Cranch 445 ;
New Orleans
v. Winter, 1
Wheaton, 91 ;
Westcott's
Lessee v. Fair-
field Town-
ship, 1 Peters'
Circuit Court
Rep. 44.

II. *Was he at this time such a subject?* It is not necessary to show affirmatively that he was a citizen, or even a subject of the United States. Whatever might be said in favor of that position, this case requires us only to show that he was not a subject of the Queen of Great Britain and Ireland. We can expect no assistance from English authorities or decisions. A country which executed as a traitor a person born of French parents who were temporarily in England on a visit, because he was found in the army of his own country fighting against England ; which maintains even now, that a child born in the United States, of an American mother, is a British subject, because its father, though a naturalized citizen, happened to have been born in England—such a country cannot be expected to aid much in discussing *here* a question of American citizenship. We have uniformly, and in the most decisive manner, repudiated as unjust and antiquated, the dogmas of England on the subject of allegiance. We have a code of our own upon that subject, and with a Federal court interpreting the

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Federal Constitution, the only question will be, what is the American view? We have sent as an American minister, one Frenchman, Mr. Galatin, to the court of France; and another Frenchman, Mr. Soulé, to the court of Spain; and by the law of allegiance, as laid down in England, our present minister in London is a subject of the British Queen. The English courts, whose decisions ever run in parallelism with English interests, may decide what they please. We settle the law on some subjects for ourselves.

* See The
Washington
Union, Extra,
Sept. 29, 1853.

The case of Martin Koszta, though a diplomatic and not a judicial case, is in point.* Koszta, by birth an Austrian subject, had been engaged in an unsuccessful attempt at revolution against the Emperor of Austria; and fleeing from the Austrian dominions to Turkey, had, in 1851 or thereabouts, come by agreement of the Emperor to the United States, on condition that he should not again set foot on Ottoman soil. In July, 1852, he made the usual and proper declaration here of his intention to become a citizen of the United States, and to renounce all allegiance to any other state or sovereign, and particularly to the Emperor of Austria. After remaining here about two years, he returned to Turkey for purposes of private business of a temporary kind, where he placed himself under the protection of the American consul, who gave to him a *Tezkera*, or kind of passport or letter of safe conduct. Soon after this he was seized by agents of the Emperor of Austria, and against his will, put on board an Austrian ship of war, to be taken into the Austrian dominions. Captain Ingraham, commanding an United States sloop of war, demanded his release under threat of a resort to force if the demand was not complied with by a certain

hour. The prisoner was surrendered by the Austrian sloop to an agent satisfactory to Captain Ingraham, and he came afterwards to America. This interference was complained of by Austria, which declared that it "could not consider the individual in question as belonging to a foreign jurisdiction so long as the ties which bound him to his country were not legally dissolved." And that even if Koszta "could, without violating the laws of his own country, of his own accord, and without any other formality, have broken asunder the ties which bind him to his native soil," yet in this case he had "done nothing more than declare his *intention* of becoming a citizen of the United States, and with that object in view, of renouncing his rights of nationality in the States of the Emperor." But how was this doctrine answered by our government? It declared, on the subject of allegiance generally, that the sounder and more prevalent doctrine is "that the citizen or subject having faithfully performed the past and present duties resulting from his relation to the sovereign power, may, at any time, release himself from the obligation of allegiance, freely quit the land of his birth or adoption, seek through all countries a home, and select anywhere that which offers him the fairest prospect of happiness for himself and his posterity." And while it was not contended that the "initiatory step in the process of naturalization invested him with all the civil rights of an American citizen," such step was declared to "be sufficient, for all the purposes of this case, to show that he was clothed with an *American nationality*, and that in virtue thereof the government of the United States is authorized to extend to him *its* protection at home and abroad." The government ac-

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cordingly defended the acts of all its agents ; not only of Captain Ingraham, who claimed possession of a man having an American *Tezkera* or passport (which was enough to justify him), but of the American consul, who, on learning of Koszta's mere "declaration of intention," had so far regarded him as an American citizen as to give him a document usually given to citizens alone. Indeed, the secretary of state afterwards went further than he need have done for this case, in saying that mere domicile, *animo manendi*, or without any present intention of removing herefrom, gave such nationality.

Now, if Koszta was an Austrian, and "a foreign subject," what right had our government to prevent Austria's final control of him? By interfering as it did, completely and thoroughly, our government declared in an emphatic manner that he was not an Austrian subject; that whatever new character he might or might not have as yet acquired, he had lost his old one. No doubt, as a legal view, this, merely on our principles of *allegiance*, was right. We can well conceive, under our laws, of inchoate or initiate citizenship; and inchoate American citizenship is inconsistent with the completeness of any foreign subjection; perhaps with its existence at all. A man, it is true, must have a domicile somewhere; and he must have perhaps a national character. But it has not been decided that he must necessarily be a citizen *totus, teres atque rotundus*; invested with all political and civil rights of citizenship of the most favored class. Citizenship, under the American view, may be in a state of transition, which is enough for our purpose; though the more true view, in respect of legal analogies, is the one above mentioned, st. that of

citizenship initiate. The alien has undoubtedly certain political rights by the mere declaration of intention; for he has a right, at the end of three years thereafter, on complying with certain terms, to become a citizen complete. His case finds a legal analogy in that of a tenant by the curtesy; who has no rights till the birth of issue; and no perfect rights till the death of the wife.

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against the
jurisdiction.

But a man may be a subject within the terms of the Constitution, and yet not be a citizen within the naturalization or any other laws. Koszta, though not a citizen within these or any other laws, was so far a *subject* that he claimed and received the most ample protection of our government; a protection which certainly we do not extend to the subjects of foreign powers. We justified an act of war for this man. Our government "in discharging" what it called "its *duties of protection*," regarded him as *its* subject, bound by its laws, and bound to act as it directed. Great Britain and the United States have millions of subjects who are not citizens at all. Many of the people of the East, and some, probably, of the West India isles, are British subjects, but not British citizens.

It must be recollected, that the delay after thus making the declaration, before the alien becomes a citizen, is not of his own seeking. He does not say, "I don't intend to become a citizen now, but will consider the subject a little and see whether I will give up my allegiance to my native country." He is willing and anxious to become a citizen at any time; but the United States, for their own protection, and to prevent persons inexperienced in our institutions and mode of carrying on our government from interfering in a matter they don't understand, requires a

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term of probation, during which they may learn more of our affairs, and thus become better fitted for taking part in them. No foreigner who has declared his intention of becoming a citizen, would be unwilling to have the process completed at that same time. The simple act of swearing to an intention to renounce all allegiance to the Queen of Great Britain and Ireland, is an act inconsistent with the idea of any further continuance of that allegiance.

It has been held, that after making the declaration of intention, there must be a continued and uninterrupted residence of five years in this country; and that any absence, however short, is sufficient to prevent subsequent naturalization. Now it would be unjust thus to require a man to remain here, and yet to assert at the same time that he was a foreigner, and not entitled to protection as a citizen of the United States. Is this requiring him to remain here consistent with the idea that our law considers him as remaining a foreign subject? This government, we have seen, has avowed its intention not to be guilty of this injustice; and further, that it will protect such persons and redress their injuries, even should those injuries be inflicted by the country claiming the allegiance. It can scarcely be that we would avow a doctrine in our intercourse with foreign nations, which we reject when applied to ourselves. That we should say to England "Mr. Byrne is entitled to our protection even against you, because he has ceased to be your subject," and yet, when he, himself, here asserts that he is not a subject of England, that we should deny it and say that he was.

If we look at the light in which a person, thus making a declaration of intention to become a citizen,

is viewed by the statutes of the United States, we shall find that he is in no place considered as remaining a foreign subject, but that he is vested with certain rights which are entirely inconsistent with such an idea. The act of 26th March, 1804, § 11, says: "When any alien who shall have complied with the first condition specified in the first section of the said original act" (that is, who has declared his intention, &c.), "and who shall have pursued the directions prescribed in the second section of the said act, may die before he is *actually* naturalized, the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such upon taking the oaths prescribed by law."

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Such a right as that given by the statute would scarcely have been given to the wife and children of a person owing allegiance to a foreign government: and it seems from this that it was thought that he ceased to be a foreign subject from the moment of making his declaration. This shows, too, that it is merely to prevent his voting that he is not naturalized at once, and that it was thought that from the time he makes the declaration he ceases to be a subject of the foreign government, and begins to become an American citizen, clothed with all the civil rights of the citizen, but from his inexperience not yet intrusted with the political rights. The expression "*actually* naturalized," is significant. It admits a naturalization short of *actual* or complete naturalization, a naturalization in law, or a naturalization for many purposes.

So, also, the patent act of July 4th, 1836, § 12, provides, "that any citizen of the United States, or alien who shall have been a resident of the United

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1854.

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against the
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States one year next preceding, and who shall have made oath of his intention to become a citizen thereof, and who shall have invented any new art, &c., and shall desire further time to mature the same, may, on payment of the sum of \$20, file in the patent office a caveat, setting forth the design," &c. Here there is a right given equally to aliens who have declared their intention, &c., and to citizens of the United States, from which right all other aliens are excluded. This seems to favor the view we have taken; but the 9th section of the act is still stronger. It is as follows: "That before any application for a patent shall be considered by the commissioner, the applicant shall pay into the treasury of the United States, or into any of the deposit banks to the credit of the treasury, if he be a citizen of the United States, or an alien, and shall have been resident in the United States for one year next preceding, and shall have made oath of his intention to become a citizen thereof, the sum of \$30; if a subject of the King of Great Britain, the sum of \$500, and all other persons the sum of \$300.

This act speaks of three classes of persons, viz.: Citizens and aliens who have been a year resident within the United States, and have declared their intention of becoming citizens thereof. 2d. All other aliens, except subjects of the King of Great Britain. 3d. Subjects of the King of Great Britain.

Now Byrne must belong to one of these classes, and to one only. And being one of the persons described in the first class, no one will say that the act considers him as belonging to the third class also. If he be not of the third class, then has the plaintiff failed to prove the facts alleged in the record, and to repel the presumption of the want of jurisdiction.

Mr. *Ingraham*, on the other side, contended that the declaration of an *intention* to renounce, &c., was not a renunciation. It was, indeed, a thing of the least possible significance. The party might perfectly well change his intention. This *locus penitentiæ* was given to him designedly; that he might see whether he knew his own mind. The omission of the party to carry out his intention involved no penalty from our government; nor would the existence of the declaration itself infer any penalty from his own. An intention to renounce at the end of five years is consistent with a continuing allegiance during the five years. Nay, it is inconsistent with any renunciation before the expiration of five years. Even the party himself, therefore, did not renounce his allegiance. If he had, it would be a nullity. He can make no renunciation not acknowledged by the law, and the law will not allow him to renounce it before the end of five years. The country could not accept it. If, then, the party does not renounce his old allegiance, and the country does not accept any new allegiance, in what way does his old allegiance cease? There is a fundamental error on the other side in supposing that a *declaration* of an *intention* to renounce is identical with an actual renunciation. The declared intention may not exist. A real intention may change, as we have said. This very case proves the truth of our argument. Byrne declared his intention to become a citizen of the United States, but abandoned the country soon after, and is a soldier in the army of the Emperor of Russia, without the least intention of ever coming back here.

The case of *Kosztka* was not a precedent. It was a political, not a judicial case. The fact that *Kosztka*

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was on a neutral territory, Turkey, with an American passport, was enough to justify our government in saying to Austria, who had arrested him by main force, against the complaint of Turkey, "You have treated our 'protection' with indignity;" and in justifying in the eyes of the world, at least, a gallant officer of our navy who, with patriotic motives, had compelled a surrender of the man to the government with whose sign of protection he was invested.

The acts of Congress which have given some privileges to persons declaring intention are of no significance, either as facts or arguments. Congress may favor such persons, as it has in special cases favored aliens who had made no declaration at all. An act by Congress can't amount to an act by an individual no way connected with Congress: nor can acts of Congress, having nothing to do with the naturalizing of aliens, cause the transfer of allegiance from one sovereign to another. The very sections of both the acts relied on speak of persons who have done no more than "declare intention" as "*aliens*." They favor our view more than they do that of the other side.

THE COURT'S
OPINION.

GRIER, J., admitted that the question, as a judicial one, was new, and of some difficulty; but it being, as he stated, his opinion that a man could not throw off his natural allegiance except in assuming some new citizenship, he refused to dismiss the case in a summary way, for want of jurisdiction. And there being no disputed facts in the case, he directed a verdict for the plaintiff, giving leave, however, to the defendant to move to set it aside if he desired. The motion was made; but Byrne having actually abandoned this

country soon after the suit was brought, and there not being any likelihood whatever of his return, the case was not heard of further (A)

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OPINION.

(A) The conclusion thus adopted by the court in this case is sustained by the view subsequently taken by the Court of Appeals in Kentucky, in *White v. White*, A. D. 1859, 2 Metcalfe's Equity, 189, where it was decided that an alien who had taken the preparatory oath to become a citizen of the United States, is not thereby rendered capable to take lands by descent; and that his subsequent naturalization does not operate to invest him with the title which in the meantime has vested in the commonwealth. It was supported, also, in the view taken by the Federal government at an interesting crisis of American history; as appears by the following letter of the secretary of State to the then British chargé at Washington:

DEPARTMENT OF STATE,
WASHINGTON, July 20, 1861.

Sir:—Having informally understood from you that British subjects who had merely declared their intention to become citizens of the United States, had expressed apprehensions that they might be drafted into the militia under the late requisition of the War Department, I have the honor to acquaint you, for their information, that none but citizens are liable for duty in this country, and that this Department has never regarded an alien, who may have merely declared his intention to become a citizen, as entitled to a passport, and consequently have always withheld from persons of that character any such certificate. I have the honor to be, with high consideration,

Your obedient servant,

WM. H. SEWARD.

To the HON. WM. STEWART, etc.

THE STEAM TUG SAMPSON.

[STEAM TUGS : MASTER AND SERVANT : RESPONSIBILITY OF STEAMERS.]

The court confirming its decision in the case of *Smith v. The Creole and Sampson*, 2 Wallace, Jr., 485, applies more strongly the doctrines of that case; and holds that when even small vessels, as coal heavers, are in tow, the towing boat is the servant of the vessel towed, and that the tug, being thus bound to obey the orders of the other vessel, is not responsible, though, in point of fact, giving orders to her, for damages in the proper course of its employment.

Though the rule of porting the helm is obligatory, when, in ordinary cases, vessels meet in the same line, it is not one always to be observed when they are in *parallel* lines. Circumstances control the rule; and, when a boat is moving against the tide, slowly and with difficulty (as when tugging a heavy vessel), and is out of the centre of the channel, which is left free to the other, the rule can have no application.

Steamers, especially large steamers, are held to the strictest care possible when in ports or in the neighborhood of sailing and smaller vessels; and must move slowly and with extreme circumspection. And if, from violation of this duty, small or sailing vessels are put suddenly into confusion and jeopardy, the court will not inquire whether the rules applicable to ordinary cases of meeting, have been strictly observed by the weaker vessel, or not; but will hold the steamer responsible, as reckless, for all injury happening to or committed through the act of the weaker vessel, from mistake caused by the embarrassment natural to the condition into which the steamer has put this weaker vessel.

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A LARGE steamer was coming, on a moonlight and pretty clear night, up the Delaware and opposite the city of Philadelphia, at her ordinary speed of eleven miles an hour; the tide being full in her favor, and she having come up the middle of the channel (here about nine hundred and sixty feet wide), that she might have the whole benefit of the current. A small tow steam tug, the Sampson, of sixty-five horse power, was towing, at the same time, in an opposite

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direction, a heavily laden coal schooner of one hundred and forty-five tons, which was attached to it by a hawser, fifteen to twenty fathom long. The tug and schooner were working along at the rate of two and a half miles an hour, against the tide, and were hugging the shore (being within from ninety to one hundred and sixty feet of it) of an island opposite the city; as well that they might avoid the strength of the current against them, as that they might be out of the way of ferry-boats emerging suddenly from the city docks opposite. They could go no nearer to the shore of the island, with safety, than they were. The steamer being near her place of landing, ported her helm and sheered towards the island for the purpose of rounding to at the city wharf. She had not seen the tug; and the schooner—in consequence of her spars being without sails, her motion being scarcely apparent, and her position being close upon the island where vessels often anchor to await a change of tide—was mistaken by the steamer for a vessel at anchor. The tug seeing the movement of the steamer in rounding to, and clearly foreseeing a collision if she, herself, went on her own course, star-boarded her helm to get still closer to the island. The schooner, who had been directed by the tug's pilot to follow in the wake of the tug, did the same. The tug escaped, but the schooner was brought directly into the line of the steamer, and notwithstanding all the steamer's efforts at this moment, by porting her helm, to get between the schooner and the island, a serious collision took place. Had the schooner ported her helm and cut the tow-line, she would probably have escaped.

Libels being filed by the steamer against the tug

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STATEMENT.

and schooner, and by the schooner against the tug and steamer, the District Court was of opinion, on this case, that the collision was directly attributable to the act of the tug in starboarding her helm and so taking the schooner nearer to the island, instead of doing the reverse manœuvre, of porting, which would have taken both the tug and her tow out into the channel. The tug was accordingly condemned by that court to answer the damages which both steamer and schooner had suffered.

The case came now by the tug's appeal into this court, where it was argued by Mr. *Serrill*, for the schooner, by Messrs. *Ludlow* and *Cadwalader*, for the steamer, and by Messrs. *Gerhard* and *Williams*, for the tug. After argument the opinion was thus given by

THE COURT'S
OPINION.

* 2 Wallace,
Jr., 485.

GRIER, J. By the decision of this court in the case of *The Creole*,* the remedy of the steamboat is to be sought against the schooner, and not against the tug employed to tow her. The tug was the servant of the schooner, and bound to obey the orders of her master, and if the master choose to follow the directions of the pilot or steersman of the tug, and trust to *his* skill instead of his own, the acts of the pilot may be justly considered as his own, and adopted by him. The remedy of the owners of the steamboat (if entitled to any) is therefore against the schooner, and not against its servant, the tug. Nor have we any evidence of any disobedience of orders by the tug that should render it liable to the schooner. For if the master of the schooner gave no directions to the pilot or steersman of the tug, but submitted his own will to the pilot's skill, he has adopted his acts, and has no right to charge the owners of the tug for

his own negligence. The tug Sampson and owners are therefore entitled to a decree in both cases.

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THE COURT'S
OPINION.

Assuming the schooner to be liable for the acts of her servant, the contest between her and the steamboat remains to be considered.

The tug and schooner were hugging the shore. It was, under the circumstances, their proper place. When the tug saw the steamboat coming up the river she was bound by no rule of navigation, or common sense, to cross the channel to avoid a steamboat coming up the middle of the river. She had left eight hundred of nine hundred and sixty feet of the channel free to the steamboat. Knowing her own position at one side of the channel, the tug could not anticipate the gross mistake made by the steamboat with regard to her position, or that she would needlessly cross the channel, and run under the bows of the tug and schooner. Both were carefully keeping out of harm's way, when the steamer suddenly comes down upon them by sheering out of her proper course, and the tug escapes destruction the best way she can, in the sudden emergency produced by the mistake and reckless haste of the steamboat. Whether the tug turned to the right or left to save herself from destruction, is of no importance. It was the mistake or carelessness of the steamboat to put her to the necessity of turning either way. The rule of porting the helm where vessels are meeting in a line, should invariably be observed; but where vessels are in parallel lines, when one boat is working against tide, and with difficulty tugging a heavy vessel, keeps near the shore, and leaves a free channel to the other who is coming up in the middle of it, the rule of porting the helm can have no application.

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1854.

THE COURT'S
OPINION.

If the tug had ported her helm on seeing the steamer, she would have thrown her long tow obliquely across the middle of the channel, up which the steamboat was coming. The steamboat by turning out of her course to run under the bows of a vessel hugging the shore, when a wide channel was left open before her wholly unobstructed, cannot now be heard to complain of the comparatively helpless and slow moving vessels for not exercising more skill in getting out of her way. It was the duty of the steamboat, moving with great power and momentum, with a tide in her favor, to keep out of the way of small and slow vessels, one of which was helpless, and the other slowly and painfully dragging behind her. The officer of the steamboat should have slackened her pace in order to have time to observe the difficulties of his position and to ascertain the *correct* situation of vessels, whether moving or stationary, in the harbor. With her huge mass and great momentum the steamboat cannot be allowed to dash as a triton or leviathan among minnows into the midst of smaller vessels in a port, calling upon them to take care and keep out of the way, or to learn at their cost the rule of "Port your helm."

Every one knows the deception as to the relative position of bodies to which those on board a vessel, moving into port, after night are subject. Moonlight may extend the range of vision, but it will nevertheless subject the most sharp-sighted to great mistakes in a port where some objects may be moving swiftly, others slowly, and others be at rest. The headway or momentum of a large steamboat, moving at a velocity of ten or eleven miles an hour, cannot be so suddenly checked, on the discovery of an error, as to

hinder disastrous collisions, and there cannot be a better rule of navigation, than that which will subject steamboats to all the damage occasioned by such reckless conduct in a crowded and narrow port after night. The steamboat must therefore bear its own injury, and must also answer for the damage done to the schooner.

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THE COURT'S
OPINION.

DECREE REVERSED.

[OCTOBER SESSIONS, 1853, NO. 16, COMMON LAW DOCKET.]

MINI'S ASSIGNEE v. ADAMS.

[PATENT: CORRECTION AND REISSUE.]

A patent obtained by an alien upon an oath, ignorantly or inadvertently made, that he is a citizen of the United States, is void; and not voidable only. The true representation of citizenship is a condition precedent to the issue of the patent.

Such a mistake does not fall within such "defective or insufficient description or specification" as will allow the commissioner, under § 13 of the patent act of July 4th, 1836, to receive a surrender of the old patent and grant a "reissue."

Neither has that officer any such inherent or judicial power as will, independently of the act, enable him to grant a reissue in correction of the applicant's mistake; nor power of any kind to grant an original patent eight years after the invention patented had been in public use.

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STATEMENT.

THE patent act of the United States passed July 4th, 1836—being the chief act regulating patents, and repealing all prior laws, of which there had been several, on the same matter—one, a principal one, in 1793, and a supplemental one July 3d, 1832—enacts,* among other things which the applicant must do "before" he "shall receive a patent" for his invention, that he shall make oath "that he does not know or believe that the same was ever before known or used; and also of what country he is a citizen." And enacts also,† that "before any application for a patent shall be considered" by the commissioner of patents, the applicant shall pay, if he be a citizen of the United States, \$30; if a subject of Great Britain, \$500; if any other person, \$300. An alien patentee must also "put and continue on sale to the public, on reasonable terms, the invention or discovery for which the patent

* § 6.

† § 9.

issued." The 13th section of this same act of 1836, OCT. SESSIONS,
1854. enacts "that whenever any patent, &c., shall be inoperative or invalid by *reason of a defective or insufficient description or specification*, or by reason of the patentee claiming in his specification as his own invention more than he had or shall have a right to claim as new, if the error shall have arisen from inadvertence, accident or mistake, or without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender, &c., to cause a new patent to be issued for the same invention, &c. And the patent so reissued, &c., shall have the same effect and operation in law on the trial, &c., as though the same had been originally filed in such corrected form before the issuing of the original patent." No such provision was contained in any act prior to the supplemental one above spoken of, of July 3d, 1832; which provision will be hereafter mentioned; but prior to the supplement of 1832, and to the act of 1836, the department of State, acting on some decisions of the second circuit, had been in the custom of accepting a surrender of patents where there was a defective *specification*, clearly the result of inadvertence and without any fraud or misconduct on the part of the patentee, and of granting new patents with corrected specifications. And the Supreme Court of the United States, in *Raymond v. Adams*,* while * 6 Peters,
218. it declared that the validity of such a new patent was not free from difficulty, decided in January, 1832, that such reissues were valid. The court said that it was not willing to disregard the settled practice of the office, in a case where they were not satisfied of its being contrary to law, and where they thought it required by justice and good faith. After this decision,

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the supplemental act of July 3d, 1832, above referred to, was passed, enacting that whenever any patent issued under existing laws should be invalid, "by reason that *any of the terms* or conditions prescribed, &c., have not, by inadvertence, accident or mistake, been complied with," the old patent might be surrendered and a new one issued.

In this state of law and facts, Mini, *a citizen of France*, making oath that he was *a citizen of the United States*, and paying but \$30 into the treasury, obtained on the 13th November, 1844, a patent for a new and very valuable invention in making lampblack. The patent recites both the oath and the sum paid. So far as appeared Mini's oath was not a fraudulent one.(A)

(A) His account of himself in his application for a new patent, though somewhat irrelative, may yet show to how hard a case the law was applied. The account was received without objection, and was thus :

"I have been a resident of the United States for almost thirty-seven years. I have all that time been engaged in the pursuit of industry here ; have acquired some property, and owned and occupied for thirty years the house which is my present home. Here I have married and reared a large family, and now reside among my children and grandchildren in Philadelphia, Pennsylvania. During all that time I have never been engaged in any public or private controversy, but in peace and order have rendered, and to the end of my life shall continue to render, this country of my adoption, an undivided allegiance and affection. I was, as above intimated, not born in the United States, but in Paris, France, and brought up to the trade of a colorist. In 1796, at the age of about fifteen years, I was forced from my father's house and compelled, as a conscript, to join the French army. I served under the Republic and Empire till the fall of Napoleon : I fought at Friedland, Eylau and Moscow, but not at Waterloo. After the restoration, believing myself unsafe in France, I determined to leave her forever, and settle in these States. For this purpose I procured a passport, the original of which is in my possession, and can be seen. For the sake of form it was dated June 14th, but not received till June 20th, 1815. The passport was respected till my arrival at Bordeaux, though the name of the Emperor was erased. At Bordeaux, supposing myself suspected by the police, I embarked on board the American vessel David Moffit, October 15th, 1815. As advised by the consul of this nation at Bordeaux, I assumed the character of a citizen of the United States, from Louisiana, and performed the duties of an American sailor till beyond the reach of the French police. Indeed, the David Moffit was bound to New Orleans, but she touched here at Philadelphia, where I settled, and have ever since been engaged as a colorist since my arrival, December 11th, 1815. Of

On this patent the complainant, as assignee of Mini, filed his bill to April term, 1850, against the respondents, alleging an infringement and praying for an injunction. Among other matters of defence pleaded in the respondent's answer, it was averred that "Mini was not entitled to said patent at the time it was granted to him, because he was an alien, being a native of France, and not a naturalized citizen of the United States; and that he had applied for and obtained the said letters patent, as a citizen of the United States, for the purpose of defrauding the revenue of the additional fees and charges, which, as an alien, he should have paid in order to obtain a patent." Ad-

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full age on my arrival at Philadelphia, and passionately fond of the study of works on arts and science, in the French language, I have learned but little of the English. I was ignorant of the laws of the country, and always, till recently, supposed myself a citizen. Having always paid taxes, and performed every other duty of citizenship, I voted once, and only once, and then without question or objection. This was more than twenty years ago, when strongly urged by citizens of the highest character and intelligence, born and bred here. I then supposed my voting entirely legal. Indeed, I have annually, before and since, been solicited to vote by gentlemen of the greatest respectability; but excepting this once, have never done so. The omission to vote has not been prompted by any doubt of my legal right, but by diffidence and indisposition to engage in political struggles. While engaged as above stated, I discovered, and at a great expense perfected, a new and useful improvement in making lampblack. Honestly believing myself a citizen of the country, at the time of making this discovery, and ignorant of the laws, but acting under the advice of others, I presented my application for letters patent as such citizen. The patent was granted on the 13th of November, 1844, on payment of such fees as were then required from citizens of the United States. Since the grant of my patent, about a year ago, I learned for the first time that I was not legally a citizen at the time of my application, and that my patent for that reason would be void. I most solemnly swear to you, that at the time my application was made, and the patent taken out, I believed myself a citizen, and that I had no thought or design of defrauding the United States of such sum as would have been payable by a citizen of France, to secure the patent. In truth, before the patent was granted, I had assigned all my interest in the improvement to one who then, before and since, till recently, firmly believed me a citizen of the United States. We paid all that was asked for the cost, trouble and expense of securing the patent, to those who advised us and acted on our behalf. Informed of my error, I very respectfully present you this statement of facts, and come ready to produce such evidence of their truth as you shall require."

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mitting the fact as alleged in this plea, but denying the fraudulent intent, the patentee surrendered his patent on the 24th of August, 1852, and received a "reissue," which was attempted to be connected with the original application by the following recital: "Whereas, Mini, &c., has alleged that he has invented a new and useful improvement in making lampblack (for which letters patent were issued to him, dated 12th November, 1844, which letters having been surrendered by him, the same have been cancelled, and new letters ordered to issue to him on the same specification; said original letters having been granted him upon his belief that he was a citizen of the United States, which belief arose from ignorance of the laws of the United States; he also having since paid into the treasury of the United States the sum of \$270, the balance due from the original granting of said letters patent), which he states *has not been known or used before his application*, has made oath that at the time of his original application he was a citizen of France; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the treasury of the United States the sum of \$15, and presented a petition to the commissioner of patents, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose."

On this reissued patent the complainant filed, to October term, 1852, the bill in the present case; praying that it be taken as a supplemental and original

bill, or original in the nature of "a supplemental" to that filed on the original patent.

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The question now accordingly before the court was, whether an alien, who has obtained a patent by an oath, not true in fact, suggesting that he is a citizen, can, after a lapse of seven years, and a surrender and cancelling of the patent thus obtained, lawfully obtain what is called a reissued patent connected with his original application; and whether the commissioner of patents has any authority to grant such a "reissued" patent.

Mr. *Cadwalader* and Mr. *Harding*, for the complainant, relied greatly on the case already mentioned, of *Raymond v. Adams*. That case was argued against the patent by Mr. *Webster*, with all the force of his great mind. He relied strongly on the ministerial character of the commissioner. The patent department was in all laws denominated executive, and the commissioner had nowhere the least judicial power given to him. And how, he asked, could the patentee, in applying for his second patent, make the affidavit, a prerequisite, that his improvement had not been known before that application? He then spoke of the monstrous practical effects. Patentees would try their claims under one specification, and failing, set up another; and under this other ruin third persons who had engaged in large enterprises not included in the original specifications. Notwithstanding all this, however, and much more, which, so far as the letter of the act was concerned, was conclusive, the court held the patent good, "on the general spirit and object of the law—not on its letter." The encouragement of inventors was an object of the Constitution

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Argument in
support of the
patents.

itself. It had been the favorite subject of legislation from that time. The laws ought to be construed in the spirit in which they were made. "If the mistake," asked MARSHALL, C. J., "should be committed in the department of state, no one would say that it ought not to be corrected. All would admit that a new patent, correcting the error, and which would secure to the patentee the benefits which the law intended to secure, ought to be issued. And yet the act does not in terms authorize a new patent, even in this case. Its emanation is not founded on the words of the law, but is indispensably necessary to the faithful execution of the solemn promise made by the United States. Why should not the same step be taken for the same purpose, if the mistake has been *innocently committed by the inventor himself*? The counsel for the plaintiffs in error have shown very clearly that the question of inadvertence or mistake is a judicial question, which cannot be decided by the secretary of state. Neither can he decide those judicial questions on which the validity of the first patent depends. Yet he issues it without inquiring into them. Why may he not, in like manner, issue the second patent also?" The objection from practical effects was also considered and disregarded by the court. In short, nothing can be said in this case of Mini's, that was not said and answered in that.

The complainant's counsel further contended that if the second patent was bad, Mini's original patent remained where it was; and was voidable only, and not void. It might be cancelled or vacated by the patent office; but being *prima facie* good, it could not be impeached collaterally.

After argument by Mr. *Kane* and Mr. *Sheppard* on the other side, the opinion of the court was thus given by

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GRIER, J. The right of Mini, with the consent of his assignees, to surrender his original patent and to have it cancelled, cannot be doubted, whether it had been obtained by false suggestion or not; and if the invention or discovery had not been in public use more than two years, the commissioner might probably have granted to him a new original patent, on an original application alleging, *inter alia*, "that he does not know or believe that his invention was before known or used." But a new patent, seven or eight years after the application, and after the patentee and others had publicly used the discovery or invention, would be of little use, unless it can be construed to retroact by way of confirmation of the first.

THE COURT'S
OPINION.

The patent act of 1793 did not provide for a re-issue of a patent, after a surrender or cancellation of it, by the patentee, on account of a defective or insufficient description or specification. The great difficulty of making a correct specification which will stand the test of judicial scrutiny, and the very frequent instances in which the most valuable inventions and discoveries have been lost to meritorious patentees through inadvertence, accident or mistake, originated the practice of granting reissues in such cases of hardship without any statute directly authorizing or regulating them. This practice was confirmed by the decision of the Supreme Court, in *Grant v. Raymond*,* in January, 1832. This was a case of a defective specification, and refers only to the practice of reissuing patents to cure such defects. It had never

* 6 Peters,
218.

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OPINION.

been suggested to the patent office or the court, from anything that appears, that a false or mistaken assertion in regard to a matter of fact of which the applicant is presumed to be peculiarly cognizant, and by which his patent was obtained for one-tenth of its cost, was ever considered as an inadvertence, accident or mistake, which could be thus remedied. But in order to confirm the decision of the court, and to define the power of the patent office on this subject, the act of July 3d, 1832, was immediately passed. This act gave to the secretary of state a much more extensive power than previous practice had assumed or the judgment of the Supreme Court had confirmed. But though it might have included a case like the present within its terms, it left the question of the connection of the new patent with the old, in such a case, wholly unsettled.

This act was repealed by the act of July 4th, 1836, which established a new system, entirely abolishing all that preceded it. The power of the commissioner of patents to reissue patents and the effect of them, are carefully defined by this statute. By defining the conditions under which the power it confers shall be exercised—as this act by its thirteenth section does—it necessarily excludes it in all other cases, except, perhaps, where necessary for the correction of the department's own clerical errors.

It needs no argument to show that this case comes neither within the letter nor the spirit of the thirteenth section; nor can the case of *Grant v. Raymond* be cited as authorizing any such general power in the commissioner to grant a new patent to one who has obtained it by false suggestions, which shall retroact

by way of confirmation of the original, or stand in its place.

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OPINION.

When a statute defines the extent of power given to one who acts ministerially, the court cannot extend it, or validate acts done without or beyond its authority. I would not be considered as imputing any moral guilt to Mr. Mini, or intent to commit perjury in his particular case. It is *possible* that men may live thirty years in this country and not know that in order to become a citizen an alien must be naturalized. It is possible, too, that an alien dragged to the polls "*by respectable gentlemen*," and permitted to vote by a complaisant inspector, without question, may fancy himself to have been thus transmuted into a citizen.(A) But instances of such amiable ignorance are so rare that it could hardly be expected that legislatures should anticipate it by providing a remedy for those whose mistakes are the consequence of it. Nor will the hardship of this particular case justify the commissioner of patents in assuming a power not granted to him by the statute. He has no power to confirm a patent obtained by a false suggestion, either by pardoning the offence or excusing it on a plea of innocent ignorance. A mistake or inadvertence in the specification of a patent can be proved by the face of the paper, and the reason alleged for it. But where a person makes a mistake in his oath of citizenship, and enjoys the benefits of it for more than half his term, his innocence cannot be proved by his oath alone, and he ought not to be allowed to obtain a new patent for the other half by stultifying himself. This would be holding out a premium for profitable mistakes, and an encouragement to double perjury.

(A) See Mr. Mini's account of himself. Ante p. 22, note.

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OPINION.

But it is contended that if the reissued patent is void because issued without authority, the original may be set up as a good title; that it is not void, but voidable, and that the payment of the additional fee is a matter which concerns the government only, and cannot be alleged as a defence by third persons.

This might be true if the applicant had truly disclosed his citizenship, and had given his note for the \$300, which he had afterwards neglected or refused to pay.

The act of 1836 permits aliens as well as citizens to receive patents for inventions, but under very different conditions. A citizen, or one who has declared his intention of becoming such, pays a patent fee of \$30 only. An alien, if he be a subject of the King of Great Britain, must pay \$500, and all other persons \$300. An alien patentee is also compelled "to put and continue on sale to the public on reasonable terms, the invention or discovery for which the patent issued." If it were not so, it would be in the power of an alien inventor, by means of his patent, to completely prohibit the use of his invention for fourteen years in the United States. The 6th section of the patent law accordingly provides that "before any inventor shall receive a patent," among other things, he shall make oath "of what country he is a citizen."

This, as well as the other duties required by this section, is a condition precedent, without which the commissioner has no authority to grant a patent; and a defendant may allege, in his defence, the neglect or fraudulent omission to fulfil these conditions, or any of them, as a sufficient defence; and although the court has no power to avoid or annul a patent by its

decree or judgment, the patent, so far as respects that suit, is "inoperative and invalid" to vest a title in the alleged invention. Many of these defects or omissions may, by the act,* be given in evidence under the general issue in an action at law: other defences, such as a "license" or "alienage," must be specially pleaded.

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OPINION.

* § 15.

If, therefore, an alien, either through ignorance or intention, falsely represents himself as a citizen, in order to obtain a patent, he not only fails in performing one of the conditions which the statute imposes, in order to entitle him to a patent, but he commits also a fraud upon the government. And as this fact appears in the complainant's bill, the respondent may avail himself of it as a defence to the title set up under the patent, and allege that the patent thus obtained is "inoperative and invalid."

We are of opinion, therefore, that the original patent of 1844 was invalid, because the applicant did not comply with the condition of the patent act, in stating truly "*of what country he is a citizen;*" and that the reissued patent for 1852, is equally invalid; the commissioner of patents having no power to grant such a patent to act by way of confirmation of the original, nor to grant a new original eight years after the invention has been in public use, which will give a valid title to such patentee.

BILL DISMISSED WITH COSTS. Bill dismissed.

[APRIL SESSIONS, 1850, NO. 107; OCTOBER SESSIONS, 1852, NO. 8,
EQUITY DOCKET.]

INGRAHAM v. MEADE.

[REFORM OF DEEDS: ILLUSORY APPOINTMENT: GRANDCHILDREN
TREATED AS CHILDREN: FRAUD ON POWER OF APPOINTMENT.]

Where stocks had been loosely settled or transferred by a father to trustees, the certificate declaring only in general terms on its face that it was for the lady and "her children;" the nature and extent of the lady's interest or control not being, on the certificate or otherwise, in any way specified; the court did not regard such a settlement in favor of children generally as sufficient to control a solemn deed made sometime afterwards by the trustees, the lady and the father, the original founder of the trust, reciting the former loose settlement—reciting further that it was expedient now to declare the said trust, and now declaring the trust to be (among other things) that the lady on her death might dispose of the stocks among *such of her children and in such proportions* as she by her will might appoint.

A power to appoint "*among such of the children of R. & M. and in such proportions as M. may appoint*" is an exclusive power; that is to say M. may entirely exclude certain children if she pleases.

The English equitable practice of setting aside certain appointments as illusory, it seems is not known as part of the Pennsylvania jurisprudence.

A power of appointment among *children* in terms, may include *grandchildren*, if in a general way grandchildren are manifest objects of the trust. And in the case before the court, though *children alone* were mentioned as entitled to receive under *appointment*, yet as *the issue* of children were, by the same clause, provided for *in defect of appointment*, it was held that the latter provision transfused its virtue in a manner to the former one; and that such issue was meant to be included within the power of appointment also.

Although the donee of a power may not do indirectly that which it is unlawful for him to do directly, yet where the donee has exercised the power, without any agreement with the party in whose favor it in terms beneficially operates, that such party shall apply its benefits in the manner unlawful for the donee to direct, the simple fact that such party has voluntarily, and without any knowledge of what the donee intended to do, applied or agreed with a third party so to apply them, is not enough to make the appointment a fraud and void.

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MR. Richard Meade had, in the year 1812, in a somewhat loose way, transferred certain stocks, about \$50,000, to the late Edward Tilghman, Esquire, and others, in trust; with an intent apparently to provide

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a fund for his wife's separate use, and one with which she might maintain and educate their children, then all minors. No regular declaration of trust was made by anybody, nor was the stock described in the investments thereof, otherwise than as for *Mrs. Margaret Meade and her children; the nature and extent of Mrs. Meade's interest, or her control or authority in regard to the trust property, not being, in any way, particularly declared.* Mr. Meade having been a consul of the United States in Spain, was, for some years after, much away from the country, and the trust, though kept sufficiently alive at all times, appears to have been treated at none with much formality. However, in 1821, being then at home again, Mr. and Mrs. Meade with the trustees made a formal deed, in which, reciting the looseness of the trust and some other facts of the case, in order that the disposition of neither principal nor interest might be subjected to difficulty, did "mutually agree and declare" that one of the trusts upon which the property should be held was that the trustees should pay and distribute the principal among "*such of*" Mrs. Margaret Meade's "*children*" as the said Mrs. Meade, by her last will should appoint; and "*for want of such appointment,* then in trust for the use of *such of the said children as shall be living at the death of the said Margaret, and the issue of such of the said children as may then be dead, share and share alike; the said issue if more than one to take only the share which their parent would have taken if living.*"

Mrs. Meade died leaving seven children and certain grandchildren, the issue of two deceased children, and leaving also a daughter-in-law, Elizabeth, the widow of a deceased son, Robert, spoken of hereafter as Mrs.

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Robert Meade; and having by her will appointed to one child \$500; to three others \$4,000; to three others (*including one named Salvadora*) \$9,500; and as regards her grandchildren, \$3,000 to one, the issue of one child deceased, and \$5,000 to others, the issue of another child deceased. But in regard to these last appointments, st. those among grandchildren, reciting "lest I may not have the power to make the foregoing appointments and direction," she says, "in case it should be *determined* that the said appointment and direction should be invalid," "then I appoint the last mentioned sums" to A, B, &c., naming certain of her children, "their heirs, executors, administrators and assigns;" *no trust or purpose being named by Mrs. Meade in regard to it.*

A bill in equity was now filed by the daughter to whom but \$500 was appointed, against the other appointees and the trustees and executors, to set aside all these appointments as illusory or fraudulent and void.

It is necessary to mention that during Mrs. Meade's lifetime she had, under a particular exigency of her daughter Salvadora, and with a view of securing to the daughter a house which this daughter had herself built but not fully paid for, advanced to her about \$3,500 in a purchase of that house. This sum, this daughter, by an agreement or bond subsequently made, bound herself to repay after her mother's death to Elizabeth, already mentioned as the widow of one of Mrs. Meade's sons, Robert, who, as above stated, had died in his mother's lifetime, leaving this widow, but leaving no children. The history of this transaction was thus given by the daughter, one of the defendants, in response to the bill, her account being cor-

roborated generally by testimony from Mr. Gerhard, whom she mentions in it. "In about a year after her mother's purchase of the house (st. about June, 1849) the defendant ascertained in conversation with her, that this matter had prevented her from carrying into effect an object which she had much at heart, st. the raising of a fund to be left as a testimonial of her affection for the widow of her son Robert, who had been a devoted daughter to her, but for whom she had not *the legal power to provide out of her trust estate by testamentary appointment*. The defendant immediately, of her own voluntary motion and without any prompting or suggestion from her mother, declared that she would pay to Mrs. Robert Meade, the sum which had been advanced in the purchase of her house; and she afterwards wrote to her mother to the same effect, that she would pay to Mrs. Robert Meade out of whatever money might be coming to her at her mother's death. Nothing was said in this conversation about any sum which her mother was to leave her, nor was there, then or at any other time, any understanding or agreement whatsoever, that the voluntary promise of the defendant to pay Mrs. Robert Meade what her mother had advanced out of her income, should form any consideration or condition for her mother's bequest, or testamentary appointment in her favor. The defendant heard nothing more on the subject until she was summoned to see her mother during her last illness, about the 27th December, 1851. She has been informed, and believes, that some months before her last illness, her mother had expressed to her counsel, Mr. Gerhard, her intention to bequeath the amount, which she had as above mentioned advanced out of her income for the purchase

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of the defendant's house, to Mrs. Robert Meade, so that the same would be payable to her immediately on the testatrix's death, and that she was led to change this intended disposition by the suggestion of Mr. Gerhard, that it might prove highly oppressive to the defendant, if she were laid under an obligation to pay the money immediately on her mother's death. On or about the 28th of December, 1851, the defendant and Mr. Gerhard met at her mother's residence; her mother briefly said to her that Mr. Gerhard had something for her to do, and that she wished her to do it. Mr. Gerhard showed her a paper, which had been prepared by him, in which she agreed to pay to Mrs. Robert Meade, out of the first money she should receive after the death of her mother, out of the trust estate, a sum which was left in blank. The defendant sat down and made a calculation of what her mother had advanced for her. The amount thus ascertained, \$3,500, was inserted in the blank, and the paper was signed by her. She had no further conversation with her mother on the subject, except in regard to the person with whom the paper should be deposited, which, upon Mr. Gerhard's suggestion, and with her mother's assent, was deposited with a common friend, Mr. Stewardson."

In regard to the appointment over to the children of the sums originally left to grandchildren, the bill charged that they were made under an express or implied agreement that the legatees should apply them to the purpose of the original appointment, and that the legatees were bound in conscience if they received them so to apply them: and it interrogated the legatees, who were defendants in the bill, whether any and what conversations, and what agreement or under-

standing, expressed or tacit, they had had with Mrs. Meade; and whether they themselves “do intend now or hereafter to hold or apply the said sums which may be received by them under the said alternate appointments for the use of either of the parties to whom by the said will the appointments were originally made;” and whether such holding or application is in pursuance of any verbal or written, tacit or expressed contract, agreement or understanding between them and Mrs. Meade, or because of any request of hers, or intimation from her.

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The answer denied very fully any such agreement or understanding, conversation, request and intimation; but declined to answer (as not bound to do so) whether *since* Mrs. Meade's death the legatees ever had made any agreement respecting the application of any sums which may be received by them under the alternative appointments; or to state what their intentions were on that subject; alleging that whatever disposition they might make of the same would not be in pursuance of any verbal or written, expressed or tacit understanding with Mrs. Meade, or because of any request of hers, or intimation from her to them.

Mr. *Meredith* and Mr. *McMurtrie* for the complainant, contended that here was a clear trust created in 1812 for the children of Mrs. Meade, generally, *i. e.*, for all the children, and for all alike. Its want of formality was wholly unimportant. A trust “for the children of Mrs. Meade” being a clear expression, and there being no other expression, it is a controlling one also. When the trust was created, in 1812, no reason existed for a distinction between the children, none was meant to be made, and none was made. The

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trust being for all the children alike, the wife, husband and trustees had no right, without the children's assent, to change it. If the deed of 1821 meant to change it, the terms "such of" and "in such proportions" must be treated as illegally put in, and the deed of 1821 must be read by the light of the settlement of 1812.

II. The head of illusory appointments was a well known one in England at the time of our revolution. It has never been since repudiated here. It may be often difficult in application; but so are many heads of the law—salvage, commissions and others. But there are certain principles to be inferred from cases; and these will show that such an appointment as this is illusory—\$500 to one child, and \$10,000 nearly, to another.

III. A power to appoint to children excludes a power to appoint to grandchildren. The power of appointment in this case does not arise on a loose or informal instrument. On the contrary, it arises on an instrument of special form and solemnity; one which was made to originate, give and perpetuate form. Its words therefore are to control; and those words are clear. If the appointment is made by will, the right to appoint is among children alone. If the disposition is effected by intestacy, it is to children and grandchildren. But to take the provisions made in case of intestacy, and apply them to a wholly different, distinguished and preceding case—the case of appointment by will—is to confound a testament and intestacy, and to destroy the whole meaning of legal provisions. At any rate, carry the mode of interpretation through, and if the term grandchildren in the last clause—the clause of intestacy—is to control the

word children in the former one—the clause providing for appointment by will—then let the last clause control the former altogether; and make an *equal* division among all parties. To that the complainant will accede.

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Then with regard to the alternative appointment. Here, in the first place, is a litigious clause. If it “shall be *determined* that the said appointment and direction is invalid.” It can never be “determined” without a suit. The clause invites directly to litigation. But the plan is a contrivance, a fraud on the power. Who doubts that the grandchildren will receive the amount if the legatees receive it? Indeed, the defendants decline, in terms, to give any account of present agreements or intentions. Of course, among persons of intelligence, having as they deserve to have, confidence in each other, there were no contracts or conversations where contracts or conversations would be fatal. But that there is an intention; in fact, an obligation in conscience, to carry it out, and that the alternative bequest was made with the expectation and purpose that it should be carried out fully, faithfully, exactly, who denies or doubts? And this is the very sort of thing from which equity took its rise—which it particularly lays its hands on as contemptuous and offensive, in this instance to herself.

After argument on principle and authorities, by Mr. P. M. McCull, on the other side, the opinion of the court was given by

GRIER, J. I. *Is this appointment of \$500 illusory and therefore void?* The theory on which the English chancellors have acted in setting aside certain appoint-

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ments as "illusory," is apparently founded in equity and justice. But like many other theories which are very plausible in the abstract, experience has shown this one to be difficult in application. The term illusory is vague and indefinite, depending on uncertain discretion or opinion of the person using it. Where a power is given by the donor to another to distribute, it is for the purpose of inequality, which future and unknown events may make just and judicious. The donor might do with his own as he pleased—give a penny to one, and ten thousand pounds to another. He has a right to intrust this power to another by substitution. The objects of his bounty are now all equally worthy (infants perhaps); if the division were made *now*, there is no reason for inequality. But before the time arrives for distribution, there may be a thousand reasons why the distribution should be unequal. When a chancellor undertakes to decide that any degree of inequality is a fraudulent exercise of the power, he is assuming to himself a knowledge of the secret wish and intention of the donor not expressed in the deed, and undertaking to exercise a discretionary power not intrusted to him, but to another. It would perhaps have been better originally to have adopted the adage "*stet pro ratione voluntas*" in such cases, than to have assumed this indefinite discretionary and therefore dangerous power over men's property. However much the chancellor may laud his great principle, that *equality is equity*, how does he know that even extreme inequality was not the very purpose and object of the power? I certainly concur with the scruples expressed on this sub-

* 5 Vesey, 849. subject in the English chancery cases of *Kemp v. Kemp*,*

† 9 Id. 393.

‡ 16 Id. 15. *Butcher v. Butcher*,† and *Bax v. Whitbread*,‡

We know of no cases showing whether this doctrine, so much disliked by later authorities and finally abolished by act of Parliament in England, has ever been adopted by the courts of Pennsylvania. We are, therefore, pleased to be relieved from the responsibility of deciding the question whether the appointment of \$500 to one of a class of nine or ten in the distribution of \$50,000 be illusory or not.

The power in this case is not only to distribute *among*, but to *select from*, the class of persons pointed out. It is what is called an exclusive power. The right to select necessarily implies the power to exclude. No distributee can say his share is illusory, when the distributor was not bound to give him anything. We cannot strike out the words "such of," out of this deed; and unless we do so, the rules of grammar and all legal precedent must be disregarded, before we pronounce this not to be an exclusive power. The cases on the subject are too numerous to be specially noticed, but may be found collected in Mr. Sugden's work on Powers.*

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* C. 7, § 5.

II. *Are the appointments to the grandchildren void for defect of power?* As the alternative appointments are made to "children" in case those to the grandchildren should fail for want of power, there can be no failure for defect of power or want of appointment. Whether the appointment to the grandchildren be good is, therefore, a question in which the complainants in this bill have no concern. It is a point, nevertheless, on which the court are compelled to give an opinion, and the only one in which we have found any difficulty in arriving at a satisfactory conclusion.

It is undoubtedly a general rule in the construction

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both of wills and deeds of settlement that while the word "issue" will be construed to include grandchildren, the word "child" or "children" will not receive such construction. Hence it has been laid down as an established rule, that a power of appointment to children, will not authorize an appointment to grandchildren. Neither will a legacy or devise to "children," be construed to include grandchildren. And when there is nothing else in the deed or will to show that the testator or donor did not use these words in a different sense, this rule of construction should not be departed from. But every instrument must be construed from its whole contents taken together, in order to ascertain the true meaning and intention of the party or parties to it. No one isolated word or term can be seized upon and made to absolutely control the rest of the instrument. The testator or donor may have used particular words either in a wider or narrower sense than that given by philologists or judges. The word "issue" may be found from other clauses to have been used to designate a child or children only, and not to include grandchildren. Lord Alvanley has said,* that "children" may mean "grandchildren" where there can be no other construction, "but not otherwise." This dictum, like many other acute dicta, must itself be construed with some latitude, as if taken literally it would deny the right of the court under any circumstances to give such construction. But I presume that Lord Alvanley meant no more than that this term could receive no other construction, unless from the external circumstances of the testator the devise, gift or power would fail altogether, as in *Gale v. Bennet*,† where it was decreed that grandchildren might claim a devise "to

* Reeves
v. Bryce,
4 Vesey, 698.

† Ambler, 681.

children" where there were no children. Or where a more comprehensive meaning must necessarily be given to the word to render it consistent with other clauses of the instrument clearly expressed. Thus in *Deveau v. Barnwell*,* grandchildren were decreed to take under the words "my surviving children," under the pressure of circumstances which showed that such must have been the intention of the testator; the court saying with Lord Macclesfield, "if there is no precedent it is time to make one." But such a construction should not be made unless a strong case of intention, or necessary implication requires it.

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* 1 De Saussure, 499.

The deed before us shows a clear and indisputable intention to include grandchildren among the beneficiaries of the trust: it makes the issue of a deceased child the representative of its parent, and as much the object of the bounty of the donor as any living child. The clause giving the mother the power to select and distribute unequally among the beneficiaries, and which uses the word "children" only, is immediately followed by that defining the class of beneficiaries as "such of the said children as shall be living at the death of said Margaret" and "*the issue of said children as may be dead* share and share alike which their parent would have taken if living." Here the donor himself describes the persons meant in the first clause, giving a power of selection and distribution. They are described as the "children," but not as the children surviving at the death of the mother; but all the children of the donor and his wife, the dead to be represented by their issue or offspring if they left any. To construe this power so as to restrict the objects of it to a part of the beneficiaries, would be inconsistent with the clear intention that the issue of deceased

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children should stand in "*loco parentis*." When the deed of settlement was executed, no reason was known why any should be excluded; the grandchildren were equally the objects of the donor's bounty as their parents would have been if alive. If so, the power to select or distribute according to future changes among the objects of their affection in order to its just execution, must be construed to include all the recipients of their bounty. Suppose all the children except one or two died before the mother, leaving issue; the exercise of the right either to distribute or select must be at the expense of nine-tenths of the beneficiaries who would be incapable of receiving anything by appointment. The power to select or distribute cannot be exercised at all, or only injuriously, unless it be as wide as the bounty.

We do not think it would be carrying out the intention of the donor as clearly expressed in this deed, to construe the word "children" so as not to include those deceased before their mother as represented by their issue. Any other construction which would make the exercise of the power of selection or distribution be a necessary exclusion of part of the beneficiaries contrary to the desire of either father or mother, the donor or the donee of the power, would in our opinion be a declaration that the deed is inconsistent with itself, and grossly absurd.

We are of opinion, therefore, that the appointments to the grandchildren are valid.

III. *Is the appointment to Salvadora a fraud and violation of the trust?* It must be admitted that if the bond given by Salvadora to Mrs. Robert Meade stood alone, and without explanation, there would be some plausible grounds for this charge.

It is unnecessary to examine the numerous cases on the subject of fraudulent execution of powers, as we do not consider the facts of this case to bring it within the category. The answer in this case is responsive to the bill and instead of being impeached is fully supported by the testimony of Mr. Gerhard. They amply explain the whole transaction, and show there was no act tending, nor intention on the part of the testatrix to commit a fraud on the power entrusted to her, by improperly diverting the trust fund to herself or others for whom it was not intended. The debt due from Salvadora to her mother was transferred to Mrs. Robert Meade, while the time of payment was extended, till Salvadora should be in funds from the receipt of her share or portion of her expectancy in the trust. The whole transaction was just and honorable, and wronged no one.

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DECREE: That by the deed, &c., Mrs. Meade had an exclusive power of appointment, &c., which gave her a right to select among the objects of the power; that the appointment of \$9,500 to Salvadora was not made in fraud of the power; that the grandchildren were proper objects of the power; and that the several appointments, including the one of \$500 to the complainant, were and are valid appointments under the power.

DECREE.

[EQUITY DOCKET, NO. 1, OCTOBER SESSIONS, 1852.]

THE MIANTINOMI.

[FEDERAL AND STATE LEGISLATION : WEIGHTS AND MEASURES.]

The regulation of weights and measures having been given by the Constitution to Congress, it is doubtful whether the enactments of any State on that subject are of any validity whatever; even though Congress have wholly neglected to attend to this regulation.

When parties contract for any material by weight, using terms that have come to us from times past, with a definite meaning, such as "tons,"—which have been commonly regarded as meaning 2,240 lbs.,—the mere fact that a State has undertaken to regulate weights and measures, and, in discharge of such an office, has fixed the ton at 2,000 lbs., will not dispense with an obligation to furnish the old measure.

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* Art. 1,
§ VIII., ¶ 5.

† § 13.

‡ § 17.

THE Constitution of the United States* gives to Congress the power "to fix the standard of weights," a power which, however, it has never exercised except by an act of May 19th, 1828, in which it declares that a certain "brass troy pound weight," then in the custody of the director of the mint of the United States, shall be the standard troy pound of the mint. In this state of Federal inaction, the Legislature of Pennsylvania by an "act to fix the standards and denominations of measures and weights" in that commonwealth, enacted† on the 15th April, 1834, that the standard of weight shall be a pound, to be computed upon the troy pound of the mint of the United States, referred to in the act of Congress of May 19th, 1828, to wit: "the troy pound of this commonwealth shall be equal to the troy pound of the mint aforesaid, and the avoirdupois pound of this commonwealth shall be greater than the troy pound aforesaid in the proportion of 7,000 to 5,760:" and enacted further‡ that

"the denominations of weight of this commonwealth, whereof the pound avoirdupois as heretofore provided is the standard unit, shall be, 16 drams, make one ounce; 16 ounces, make one pound; 25 *pounds*, make one quarter; 4 quarters, make one hundred; 20 hundreds, make one ton."

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Notwithstanding this law, the ton of coal (the ton weight being the unit by which coal is always bought in Philadelphia), as perhaps of other things, was popularly regarded as being 2,240 pounds. To the great majority of people the existence of the Pennsylvania act was unknown. But towards the close of the year 1853,—coal having been then lately very much, as it continued afterwards, on the rise in price,—almost all the vendors of coal of Philadelphia, met together in a public way, and having made agreement with one another to this effect, publicly, and in a body, "*Resolved*, that on and after December 1st, 1853, the weight for a ton of coal shall be 2,000 pounds; and that the price be reduced in proportion to the weight." These proceedings of the coal dealers were matters of great publicity, and known to most persons who burn coal and read the city newspapers. From that time the coal dealers, when furnishing coal in the city, furnished but 2,000 lbs. as a ton.

In this state of facts, one Holt had contracted, previously to these *resolutions*, to furnish the steamer Miantinomi with several hundred "tons" of coal at the market prices, and furnished that part of his "tons" which he delivered after the resolutions at the rate of 2,000 lbs. He had given no notice to the parties with whom he had contracted, that he was, after the resolutions, furnishing 2,000 lbs. as a ton, and it did not appear that they knew of the resolu-

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tions. As a fact, they discovered the change in the kind of "tons" only by observing that the new tons did not burn so long, nor propel the boat so far, as the old ones: in other words, that 2,000 lbs. would not have the effect of 2,240 lbs. In regard to price, while there was nothing to show that *compared with the subsequent still rising rates*, the libellants had not reduced the price of the short tons in proportion to the reduction of the unit, it was clear that *with the still rising prices*, the defendants were charged *more* for one of the *short tons*, than under the old prices they had been for the large ones. And there was nothing which showed that they knew about rising prices at all. Holt having libelled the steamer for his claim, the owners of the vessel alleged in defence that he "had rendered false weights to the amount of many hundred of pounds," and claimed a deduction to be made for these "tons" of 2,000 lbs.

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GRIER, J. It is almost superfluous to remark that as it requires the assent of both parties to make a contract, it also requires the same consent to change it. It may be said, that as two multiplied by three will have the same product as three multiplied by two, the result will be the same either way, provided the price be diminished in proportion to the quantity. This is undoubtedly true; but it is not the case before us. The defendants finding the price increasing every few days, continue to pay the apparent market value under the supposition that they are receiving their coal according to the unit of quantity and valuation, when they made the contract. If notice had been given them that eleven per cent. was to be added secretly to the price by this contrivance of diminishing

the quantity, they might not have assented to it. And until they can be shown to have assented to it, they cannot be made its victim.

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If the grocers in a particular street finding that it would add much to their profit in times of scarcity and high prices, to deliver flour and other provisions at the pound troy instead of the pound avoirdupois, as heretofore, and should conspire together to deliver thereafter but twelve ounces to the pound instead of sixteen, such conduct would receive no countenance from the public thus imposed upon, and in courts of justice would be treated as a fraud, and receive that appellation without seeking for a milder synonym.

Coal is a necessary of life in this climate, and unfortunately for the consumers, the demand has increased to such an extent as to put it in the power of those who supply it to extort their own price. When its price was moderate, and the profits of the vendor merely remunerative, there were no schemes to reduce the quantity by changing the meaning of words to suit the rapacity of speculators. This scheme of reducing the quantity by ten per cent. was not concocted till after prices had increased twenty-five per cent. and were proceeding up to fifty. When it was discovered that competition could not check speculation on a necessary of life, the public were made the victims of this agreement, contrivance, conspiracy, or whatsoever it may be called.

My attention has been turned to an act of the Pennsylvania Assembly passed in April, 1834, on the subject of "weights and measures." For the purpose of the present case it may not be necessary to decide upon the power of any State Legislature to make such an enactment. It was probably intended for

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the convenience of the officers on their public works.

As approximating decimal divisions it is much more convenient for calculation when the pound is made the unit on which to compute price or value. In very many cases the pound and its decimal multiples have been adopted almost entirely instead of the old quarters, hundred weights and tons; just as 25 feet has been adopted by engineers as the cubic yard instead of 27. But in all those cases a change of language is made to suit this convenient change of multiple. Thus the engineer would state on a contract for excavation the price at so much "per cubic yard of 25 feet." So the term "per 100 lbs.," or "hundred neat," are substituted for "cwt.," which represents 112 lbs. And when the ton is used to represent, for convenience of calculation, 2,000 lbs., the contract should and usually does so state it as "per ton of 2,000 lbs.," or "per ton neat." But as coal and other cheap and heavy articles have never been sold by the pound as a unit for calculating its price, but by the ton, convenience of calculation has never required, nor has custom sanctioned any *reform* (so called) or change in the amount so represented by this unit. Accordingly, notwithstanding, that this act of the Legislature was passed more than twenty years ago, it has never been adopted in practice in the sale of coal and other heavy articles whose unit of calculation is usually by the ton and not by the pound.

The Congress of the United States having the power to regulate commerce between the several States, it was of great importance that the value of money and the standard of weights and measures should be uniform. Accordingly their regulation is intrusted to Congress. Every change or innovation

by the several States would tend only to increase confusion and difficulty. This duty intrusted to Congress, seems apparently to have been much neglected. I find no legislation on the subject by Congress, except in the act of May 19th, 1828, c. 67, where it is enacted that "the brass troy pound weight, procured by the Minister of the United States at London, in the year 1827, for the use of the mint, and now in the custody of the director thereof, shall be the standard troy pound of the mint of the United States." As the English standard of weights and measures had been adopted by long custom in every State, it was, perhaps, unnecessary for Congress to interfere further than it has done. For as the standard of the London tower weights, and the English terms or denominations used to represent their fractions and multiples, were universally adopted in the United States, and of course uniform, nothing was required of Congress, unless it entirely changed its standard and introduced decimal fractions and multiples for greater facility of calculation, as it has done in our coin. Whether this uniformity of weights and measures has been established by custom or congressional legislation, it is evident that any interference of State legislation to change either the standard of weights or the meaning of the terms used to represent its multiples or fractions, is not only useless but injurious. Accordingly, the provisions of this act of Assembly have remained a dead letter, and it is practically obsolete so far as concerns the standard *ton*. It compels no one, nor could it do so, to adopt its use of language. Men may contract either with or without its sanction to make the pound their unit, and to sell at so much per 100 lbs.—or so much for 2,000 lbs., and

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they may call it, or any other multiple of a pound, a ton, if the parties to the contract agree to do so. But this act, if it have any efficacy whatever, (which, as I have intimated, is doubtful,) cannot be invoked to change the terms of a contract contrary to the consent of one of the parties, or to authorize vendors who buy coal at one standard of weight to sell it at another, and thus extort from purchasers an increased price for a diminished quantity.

A deduction must be made as claimed by the defendants on their theory that 2,240 lbs., and not 2,000 lbs., are a ton.

JONES v. THE COAL BARGES.

[ADMIRALTY JURISDICTION.]

The coal barges, arcs, or flat boats used on many rivers, to transport merchandise down stream, and usually broken up and sold for lumber at the end of their voyage, are not "ships or vessels," subject to admiralty jurisdiction on such waters.

Although the extension of admiralty jurisdiction over our fresh water public rivers seems to have been assumed rather from the decision of the Supreme Court in *The Propeller Genesee Chief v. Fitzhugh*, decided in 1851, than from the act of Congress of February 26th, 1845, which speaks only "of the lakes and navigable waters connecting said lakes," yet it does not follow that the admiralty may assume jurisdiction over everything floating on such waters. On the contrary, the restraints of that act should be applied to all the jurisdiction now assumed over such waters, to wit, "to vessels over twenty tons burden, licensed and enrolled for the coasting trade," and the pleadings in such cases should contain such averment in order to give jurisdiction.

THE Constitution of the United States, according to the views taken of it by the Supreme Court for the first fifty years of our Federal government, confined the admiralty jurisdiction of the courts to tide waters; and considered that, however large were the streams or lakes, yet if the water in them was not tidal, no admiralty jurisdiction could be exercised over them.* Although, therefore, an act of 1789, which gave the court jurisdiction over enrolled and licensed vessels, spoke, in one place, indiscriminately of "waters navigable from the sea," our lakes, which had been the scene of naval victories between ships of war, and our western rivers, of late years navigated by large steamers freighted with immense cargoes, were for more than sixty years regarded as beyond any

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* The Thomas
Jefferson, 10
Wheaton, 428;
Orleans v.
Phœbus, 11
Peters, 175.

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* Act of Feb-
ruary 26, 1845.

constitutional control of the admiralty. In 1845, however,* Congress taking a more extensive view of its constitutional rights, passed a law giving to the Federal courts jurisdiction "in matters of contract and tort arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, *enrolled and licensed for the coasting trade*, and at the time employed in business of commerce and navigation between ports and places in different States and Territories *upon the lakes and navigable waters connecting said lakes*." This law was decided

† 12 Howard,
443.

in 1851, in *The Propeller Genesee Chief v. Fitzhugh*,† to be constitutional; and the Supreme Court, reversing its earlier decisions, as not made upon a sufficiently comprehensive view of the Constitution, and of the extent, progress and necessities of the country, seemed, in that leading case, to declare that the admiralty jurisdiction granted by the Constitution to the Federal government, and the exercise of which Congress might allow to the courts when it pleased, extends to *all public navigable lakes and rivers where commerce is carried on*.

In this condition of the law, a coal barge, loaded with coals, and on its way from Pennsylvania into another State, was coming down the Monongahela, a considerable and important stream at Pittsburg, Pennsylvania, but one having numerous dams and locks in it, and one which, though navigable in the rainy season for small steamers, is perhaps hardly to be reckoned one of the great navigable rivers of the west. Coming out of a lock in the river, this barge ran foul of another barge loaded with coal, and fastened to the shore, but standing out further in the stream than she had any right to be. The

descending barge was broken, and sank with her cargo, and a libel by its owner having been allowed and *sustained* by the District Court, the case came here by appeal, the correctness of that court's action in sustaining the libel, being the point in issue here. These western coal barges, it must be added, *are rough trunks*, being flat boats with sides, made merely for transporting coals, and, owing to the trouble of returning up stream with them, usually sold as lumber at the end of the voyage. *They have no coasting license.*

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GRIER, J. The subject of dispute proposed by the libel, is a collision between two coal barges loaded with coal. They are not ships or vessels in the maritime sense of the terms. They do not take out a coasting license. They are generally mere open chests or boxes of small comparative value, which are floated by the stream and sold for lumber at the end of their voyage. A remedy *in rem* against such a vessel, either for its contracts or its torts, would not only be worthless but ridiculous; and the application of the maritime law to the cargo, and hands employed to navigate her, would be equally so.

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The case of *The Propeller Genesee Chief*, reversing the former decisions of the Supreme Court (which had adopted the English definition of navigable rivers, and bounded the jurisdiction of admiralty courts by tide water), does not necessarily extend the sceptre of the admiral over every stream whose occasional floods or factitious basins may suffice to float a steamboat. If it was unreasonable to refuse to ships and steamboats on our great lakes and rivers the benefit of the remedies afforded by courts of ad-

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miralty, it may be equally so to apply the principle and practice of the maritime law to everything that floats on a fresh water stream. Every mode of remedy and doctrine of the maritime law affecting ships and mariners, may be justly applied to ships and steamboats, but could have no application whatever to rafts and flat boats. A court of admiralty is not needed to try common law actions of trespass, nor to administer common law remedies in any form.

The act of 1845 extends the jurisdiction of courts of admiralty to "the lakes and navigable waters *connecting said lakes*." On other navigable rivers it seems to have been assumed by virtue of the decision of the Supreme Court, and without regard to the limitations of the act of Congress, either as to place or subject. But the court having decided this act of Congress to be constitutional and binding, it must govern the question as to the *subjects* which it defines, even if it be not considered as denying such jurisdiction on the navigable waters omitted.

This act confines the jurisdiction of admiralty courts on the lakes and rivers, to "*matters of contract and tort* in, upon, or concerning steamboats and other vessels of twenty tons burden and upward, *enrolled and licensed for the coasting trade*, and at the time employed in business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes."

The Supreme Court, in speaking of this provision in the act of 1845, and of the act of 1789, says: "These laws are both constitutional, and ought therefore to be carried into execution. The jurisdiction, under both laws, is confined to vessels en-

rolled and licensed for the coasting trade; and the act of 1845 extends only to such vessels when they are engaged in commerce between different States and territories. It does not apply to vessels engaged in the domestic commerce of a State, nor to a vessel, or boats, not enrolled and licensed for the coasting trade under the authority of Congress.”*

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* The Propeller
Genesee v.
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Howard, 458.

It follows, that in order to show the jurisdiction of the District Courts of the United States in “ matters of contract and tort” arising on the lakes and other navigable rivers, the libellant should aver and prove the facts and conditions stated in the act of Congress of 20th of February, 1845. And as in this case no amendment to this effect can be made conformably with the facts of the case, the DECREE IS REVERSED, and the cause dismissed for want of jurisdiction. The question of costs is reserved for further hearing.

[AT PITTSBURG.]

THE STEAM TUG ENTERPRISE. THE STEAMER NAPOLEON.

[MANDAMUS TO DISTRICT COURT: APPEAL IN ADMIRALTY AND
REHEARING.]

The Circuit Court has no power to issue a mandamus to the District Court, to compel it to set aside its decree in admiralty, or to grant a rehearing, or to allow an appeal after the time has elapsed in which it might have been taken; not even in cases where this court thinks that the District Court should have reheard the case, or allowed an appeal under the circumstances. In a question of collision between a "tow" on the one side, and a steam tug and a steamboat on the other, where it is difficult for the owner of the tug to ascertain who has been in fault, the owner of the tow may "implicate both vessels, demanding a decree against one or both, and thus compel them to interplead and settle the question of their respective liabilities;" and he need not run the risk of losing his suit first against the tug, because her owner can show that the steamer was in fault, and then against the steamer, because her owners can show, upon new evidence in their power, that the tug was in fault.

Where a boat in charge of a tug, whose owners have contracted to tow her, is lost by a collision between the tug and a steamer—the boat towed being clearly in no fault—the court will not, on a libel against the tug, be astute to inquire whether as between the tug and the steamer, the one or the other of these last was to blame for the collision. In a case of doubt—and especially if by an error of the court below, not remediable here, it has lost its remedy against the steamer—it will rather give the boat towed reparation against the tug which has contracted to carry it, leaving this last to recover the whole or a quantum of damages from the steamer.

Steam tugs are not liable as common carriers for the safety of vessels which they are towing, or of their cargo.

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THESE two cases, though the points adjudged in each are different, grew originally out of the same transaction, and were decided in this court, as they are here reported, together. The cases arose on libels in admiralty, filed by one Hitner. The transaction was thus:

The libellant, Hitner, contracted with the steam tug Enterprise, to tow his canal boat, loaded with iron, along the Delaware. While going up the river with her tow, the tug met the steamer Napoleon. A collision took place, by which the iron became a total loss. The collision was not an inevitable accident, but arose from the fault of either the tug or the steamer, or of both. But whether it was the fault of one, or of the other, or of both, Hitner did not, himself, know; and instead of "implicating both vessels by demanding a decree against one or both, and thus compelling them to interplead and settle the question of their respective liabilities" (which this court said expressly, he should have done), he suffered himself to be persuaded by the owners of the tug, that the fault was all the steamer's, and so filed his libel in the court below against it alone; the owners of the tug conducting the suit in fact, but not being in any way parties to it on the record. The District Court had thought that the fault was exclusively the tug's, and so dismissed the libel. *Without taking an appeal from this decree* within the time prescribed by the rules of the District Court, but relying on the decree as showing conclusively that the steamer was not in fault, and therefore that the tug must be, Hitner then filed his libel below against the tug; and the owners of the tug, producing better evidence when their own interests were involved, than they had done when the steamer's were, the District Court now decided that the fault was exclusively the *steamer's*, and dismissed the libel against the tug. Finding himself in this dilemma, the libellant next petitioned the District Court to *rehear* his suit against the steamer, or to allow an appeal on it

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nunc pro tunc. This was refused by the court, and the question in the second of the cases in this court, st. the case of the steamer Napoleon, was, therefore, not upon the action of the District Court upon the original libel against the steamer, but upon the action of that court in refusing to grant an appeal, or to rehear. It involved the question of *the right of this court, the Circuit Court, to entertain an appeal from the District Court in admiralty on a petition to grant an appeal or to rehear, when such petition was refused.* The question in the other, the *first* case, st. that of the steam tug, was an ordinary appeal. The evidence was conflicting. The tug, it was certain, had fewer lights than she ought to have had, but that omission, in the opinion of the court below, did not contribute to the collision. The collision was off the larboard side of the tug, against the starboard quarter of the wheel-house, and as the steamer had shut off her steam, and endeavored to sheer to the larboard, when the two vessels were some hundred yards apart, the District Court had thought it "almost certain that the steamer, if she had ported her helm, would have passed clear of the tug; and that she would also have gone clear even after starboarding her helm, if she had kept up her headway." And there having been, as that court thought, "time enough, seemingly, for either resort, she did neither; but, on the contrary, violated the cardinal rule, which required her to port her helm, and then by slacking her speed, increased the probability of her being run into by the tug." When the proceeding against the steamer had been before him, the district judge, on the evidence in that case, had been of a different opinion. The tug, his honor thought, had been "clearly in delict," and

t was "clear that her irregularly placed light misled the Napoleon." Where there was "no want of a look-out, no recklessness, no purpose of wrong manifested by a plainly wrong manœuvre," he would "not hold that a manœuvre, because it turned out to be unfortunate, should divert the responsibility from a party that had clearly been in the wrong." His honor was himself "inclined to think that the steamer would have done more judiciously if she had ported instead of starboarding her helm;" but he would "not question too zealously the nautical propriety of a manœuvre made in good faith and upon an emergency induced by the misconduct of the other party."

The libel against the tug was drawn rather loosely, and with a good deal of verbiage; and it was, perhaps, not quite clear whether tort or contract was the basis of the allegation. It set forth that libellants were owners of fifty tons of pig iron, in a canal boat called *The General Marion*. That on the 29th of July, 1851, the master of the *Enterprise* "undertook to tow said canal boat," &c. That by gross negligence in the management of the *Enterprise*, the *Marion* was sunk and the iron lost, in consequence of being brought into collision with the steamboat *Napoleon*, and because the *Enterprise* "made no effort to avoid the collision."

Mr. *St. George T. Campbell*, for the libellant; Messrs. *Mallery and Gowan*, contra.

GRIER, J. The libellant, who has lost his iron without any fault of his own, and who should have had nothing to stake in the game, has been compelled

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to play the cards of both parties in succession, and has lost the second game with what was the winning hand in the first. The case is obviously peculiar.

The only appeals known to courts of admiralty are in open court, *sedente curiâ*. In England, the application must be made within fifteen days after the decree.* By the act of Congress of 3d March, 1803, it must be "allowed to the Circuit Court next to be holden in the district." Whithin this limit the District Court may prescribe the times and modes of making them.† The 45th rule of the Supreme Court requires the appeal to be made while the court is sitting, or within such other period as shall be designated by the rules of the court, or by an order specially made in the particular suit.

*Godolphin in
Sea Laws, 208.

Case of the
steamer, The
Napoleon.

† Norton v.
Rich, 3 Mason,
444.

Whether a court of admiralty can entertain a bill or libel in the nature of a bill of review, according to the principles and practice of a court of equity, where there is newly discovered evidence or other matter touching the conscience of the court, is a question not raised by the case; nor do I know of any precedent for such a practice. But the same purpose may be effected by a motion or petition for a rehearing. By the 68th rule of the District Court, such a petition may be exhibited any time before execution executed. But such an application being to the conscience and discretion of the court who made the decree, it is not the legitimate subject of appeal. And the same may be said of any application to allow an appeal *nunc pro tunc*. If this court were of opinion that in a proper use of its discretion, the District Court should have reheard this case, or should have allowed an appeal under the circumstances, they have no power to give a remedy to the

appellant. We have no power to issue a mandamus to the District Court, or compel the judge to set aside his decree, or grant a rehearing, or allow an appeal after the time has elapsed in which it might have legally been taken. When a case is before us on appeal, we must hear and decide it, but we have no mode of compelling the District Court to allow an appeal or send up the record where it is not allowed. If the party has neglected to appeal in proper time, it is his own fault, and if he suffers in consequence, it is as much a "*gravamen irreparabile*" as where he suffers his goods to be adjudged to another. This appeal must, therefore, be dismissed.

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We come now to the case of the tug, The Enterprise. The libel in this case neglects to set forth in its caption whether it is a suit for a tort or on contract, as required by the 23d rule. But as by the 24th rule, amendments in matter of form may be made at any time, we shall consider the libel as amended in that behalf to suit the cause of action actually set forth in it. The complaint is clearly not for a maritime tort or collision, but for a breach of the contract to tow or carry the boat of libellants safely. Its averments, if established by the testimony, are sufficient to support the action. It is true, the libel contains much other useless and superfluous matter, which has justly subjected it to the imputation of appearing to be a suit for collision between the Napoleon and Enterprise. But in order to support his case against the tug, the libellant is not bound to justify the steamer, or show that, as between that boat and the tug, the latter was wholly in the fault. If the steamer was recklessly dashing along at full speed, after night, in the harbor of Philadel-

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phia, or near to it, seeing and hearing the tug more than a mile off, crossed her bows unnecessarily, and stopped her headway when right in front of the tug, she *may not* be in a situation to impute fault to the tug in a suit between them. And as such a controversy may possibly arise hereafter, it is not the intention of this court to intimate any opinion on this question till both parties have been heard. It is enough for the purposes of this case, that the steamer was found in front of the tug; that the tug did not back her engine or make any effort to avoid the collision, and that in consequence thereof, the libellants' boat was sunk and their property lost. It is true, a tug is not liable as insurer, as carriers for hire are, but it is bound to use all the care and diligence which prudence and caution require, to avoid bringing the tow in collision with objects which may cause its injury or destruction. The answer charges no fault to the tow or those who managed it. It was *not* lost by inevitable accident; but by being brought by the power of the steam tug into collision with the steamboat. And although the decree in the case of the Napoleon is no estoppel to the Enterprise, who was no party to it on the record, yet as between her and the libellants, under the circumstances I have detailed, it should have the force of an acknowledgment or confession in deciding doubtful questions of fact. If, as between the tug and the steamboat, the latter has been partially or entirely in the fault, the owners of the Enterprise may have their remedy for the half or the whole of the damages recovered by the libellants, and the judgment in this case cannot effect, by way of estoppel, either party in such a contest, as to any matter of fact herein decided, except that the

tug has been compelled to pay the damages caused by the collision.

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Let a decree be entered for libellants for the value of the iron lost, to be calculated by the clerk. As other evidence was given in this court, materially affecting the cause, the appellants will not be allowed costs in *this* court.

[COMMON LAW DOCKET, NO. 4, OCTOBER SESSIONS, 1853.]

NACHTRIEB v. THE HARMONY SETTLEMENT.

[CONFIDENTIAL RELATIONS : ADMISSIONS AGAINST INTEREST : CONTROLLING POWER OF JUDICIAL LAW : SOCIAL PARTNERSHIP.]

The relation of a spiritual ruler with his people is so confidential, and one of such inequality, that courts watch it narrowly as liable to abuse; and considering that free will can hardly be predicated of acts done by a person at the direction of such ruler or superior, will treat as of very little intrinsic value, receipts or releases, given by a person so dependent, by such direction against his own interest.

Admissions, such as might be considered the natural effusions of mortified pride or vanity, though clear and distinct against a party's interest, are entitled to but little weight as evidence against him.

The law allows no communities, however independent in their structure of general society—or however long established—or however much in the habit of regulating, as a community in a community, their own concerns,—to be above its constant and complete control. And even where such communities are well formed, and have been long existing with order and success, the court will neither enforce nor allow their peculiar arrangements, if against common right, further than the parties have agreed to enforce and allow them. In case of the violation by such a community, of a party's rights, as the law and the court deem rights, the court will interfere, and dealing with the community as a defendant, will override its administrations, plans and opinions; and will enforce rights and duties as it and such law deems them, irrespective and in violation of the general administration, plans or opinions.

In a social partnership, where an absolute community of property with right of survivorship, on the one hand, and care, by the community, of every member, through life, on the other—is the fundamental and pervading principle; if one member be unjustly expelled by an usurped though unquestioned authority, not having under the clear terms of the association any right to expel him, the court will not oblige him to return to the association (there not being on its part an offer of full and satisfactory reconciliation and reception), but will interfere with the fundamental and pervading principle; and though the expelled member brought nothing into the community, will give to him, for himself, a separated and individual part of the property. And where payment for the party's services at the ordinary rate of services like his—during many years that he was a member—would give to him more than his numerical proportion or share of the whole capital stock, and where the question of profits was a little

obscure, the court regarding this as the simplest and most natural justice, gave to him his numerical share or proportion of the whole capital stock, from whatever source arising, as the same existed at the time he was expelled, irrespective of the amount which he found in the association when he became a member.

IN the year 1805, one Rapp, calling himself the Reverend George Rapp, as chief or superintendent, with a number of his countrymen, emigrants from Germany, formed, by a solemn compact in writing, embracing many particulars, the well known social arrangement at Harmony, in Butler county, Pennsylvania, called sometimes Rapp's Settlement, and sometimes The Harmony Society. The causes which led to this association, were declared to be "the existing state of society and the Christian Church, as well in America as Europe; and a conviction that this condition had been caused by a departure from the theory of common property and community of interests and of labor, set forth in the primitive Apostolic Church, and a firm persuasion that a return to the plan of the said primitive church would have the effect to promote the temporal and eternal happiness of all such as should embrace it." The compact, accordingly, had for its basis, "Christian fellowship, the principles of which being faithfully derived from the sacred Scriptures, include *the government of the patriarchal age, united to the community of property adopted in the days of the apostles.*" It required on the part of the members severally, and in their social capacity, entire submission to the laws and regulations of the community, and a ready obedience towards the appointed superintendents thereof; and obliged the superintendents to a patriarchal, which included a pastoral and parental supervision, regard and fidelity. Many of the founders were poor. Some

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had property. All of them, severally and jointly, conveyed it in fee to Rapp and his successors, superintendents, for the mutual and equal participation and enjoyment of all the members; and the property itself, with the increase thereof, however contributed or arising, was declared to be, then and forever, *joint and indivisible stock*, with the right of survivorship to those who lived longest. The *restoration* of property is declared to be of "*pernicious tendency, and which cannot be enforced with uniformity and fairness.*" and "should any individual withdraw from the society, it is declared that he is not to be entitled to demand an account of the contributions he may have made, whether in lands, goods, money or labor, or to claim anything from the society as a matter of right, but it shall be left altogether to the discretion of the *superintendent to decide whether any, and if any, what allowance shall be made to such member as a donation.*" Since the foundation of the society in 1805, many of its members have died while in "communion" thereof. A large number of them were aged men and women. None ever left a last will or testament, or desired distribution of the contributions or earnings among their heirs at law, nor had administration ever been taken out in the settlement. Neither did any of them, except Rapp, appear to know anything about the property of the settlement. In 1847, Rapp himself, after a laborious devotion of forty-two years to the interests of his settlement, died intestate, leaving no property.

Celibacy was enforced, and except in one or two cases which Rapp allowed and judged of, incredibly few marriages had been allowed in the community in the course of half a century. "He taught," said the

testimony, "not to marry at all, and that those that will marry, or would marry, would be damned, for they must leave the society. They could not live there. He won't suffer it at all. As he is father, king, and priest, he has the right to do with us as he thinks proper. Christ would ask him in the other world, if we were fit or suitable for the kingdom of God." Where married persons came into the society they were not allowed to cohabit, nor have intercourse as man and wife. The relations of parent and child, brother and sister, as well as those of husband and wife, were merged in the grand social obligation. The society was to take care of the sick and aged. (Of poor, and rich, of course, there were none.) If a mother was sick, and her daughter lived out of the limits, she could not be invited to come and see her; and the "reward" of the brother who brought his sister to their sick mother, would be "to be damned, or to be the last that came out of hell, *or somehow, or in this manner*," such being the lucid conception that one of Rapp's disciples seemed to have of his master's dogma on this subject. The study of the English language was discouraged, and German was the ordinary tongue.

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The compact contained no enumeration of offences by which a member should forfeit his rights and interest in the common stock—nor did it fix or refer to any tribunal which should have the power to inflict expulsion. And although the members all covenanted to give implicit obedience to "*the laws and regulations* of the community," it did not appear that they had ever made any code of regulations or by-laws. The will and word of Rapp was in fact the only law. The government was *patriarchal*, that is,

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absolute; Rapp exercising all power, civil, religious, temporal and spiritual. He was priest and king, having absolute control over the fate and fortunes of his followers, not only in this world, but (as they were told and appeared to believe) in the world to come. If they obeyed his precepts, their names were to be written in the "Lamb's Book of Life," otherwise, they were to suffer in purgatory some millions of years, if not forever.

The members were allowed by Rapp to walk within the limits of the settlement, and to converse with one another; but to hold intercourse with any *seceded members* (of whom since the settlement in 1805, there had been several, some going on one or two occasions—as on a memorable one in 1832, under a Comte de Leon—in bodies) was a thing entirely forbidden. And when done, Rapp would deal with the offender in the way of discipline; sometimes excluding him from love-feasts, sometimes (as the testimony said), "to make it impressive," ordering him to be fed on bread and water, sometimes "to make it more impressive still," ordering that he should have no food at all, and sometimes, doubtless to give to it the consummation of effect, turning him directly out of the society.

Notwithstanding the peculiarity of this community, it had thus far been very prosperous. In the course of fifty years, not one single member of the society had ever been criminally prosecuted. External order, cleanliness, and apparent tranquility, marked the settlement; and though occasional "indiscretions" occurred among the women, and certain discontents appeared to prevail with the men, it had thus far been a moral, well-governed and contented body; and the

social problem is considered by some persons as yet in a course of favorable solution.

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But the more immediate case, to which the foregoing is a general, though not entirely irrelative preface, was this: One Joshua Nachtrieb had joined the society, without any property, in 1819; and had remained a peaceful and useful member for twenty-seven years. In 1846 certain seceding members, who professed to have claims against the society, and had given Rapp a good deal of anxiety, met Nachtrieb, with one or two others, and held a few short conversations with them on the subject of their demands and discontents. They inquired of Nachtrieb whether the society was willing to do anything for those who had left it and got nothing—whether Rapp had brought their request before the society; matters to which Nachtrieb answered that nothing had been done or said in the society about their getting anything. Rapp hearing of the meeting and colloquy, proceeded to discipline. Nachtrieb and the others were summoned to Rapp's house. "When Rapp came in," said the testimony, "he commenced on Joshua and said, 'now let us give them fellows our judgment—Joshua, you are to blame for all this.' Joshua said, 'he did not know it was wrong or he would not have done it.' Rapp said, 'you intended to raise a mob.' Joshua said, 'no; if I had thought it was wrong to go there, I would not have done it.' Rapp then said, 'you must *go right off* and leave the town.' Joshua pleaded off, said he was sorry, said *he would not go*. Rapp said, 'no; we won't have you—*you must go*.' A night or two after this, the society being all present at a religious meeting, one of the elders, when the services were over, said to Rapp,

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'there is something to be said.' Rapp then observed from the pulpit, 'something has taken place lately—it is this: Joshua Nachtrieb and some others have gone out and conversed with their friends who left us. He must now leave the society; we cannot have such men.' Rapp then asked if he was present. Nachtrieb said, 'yes, father, I am here.' Rapp said, 'what are you doing here? I thought you had gone.' Nachtrieb said, 'he was sorry if he had done anything wrong, and that if it had happened it should not happen again.' Rapp answered, 'any fool can speak so; we cannot use such men; you must leave the society; you must be off.' Rapp then inquired of the society if they agreed with him—they said *yes*. Rapp then said to Nachtrieb, 'now you know what you have to do: thy father himself, don't want you any longer.' Nachtrieb went away two days after, having previously received from Rapp \$200, and signed this receipt, which it was not shown had been obtained by any specific fraud or misrepresentation:"

"To-day I have *withdrawn* myself from the Harmony Society, and ceased to be a member thereof. I have also received from George Rapp, two hundred dollars as a donation, agreeably to the contract.

JOSHUA NACHTRIEB.

Harmony, 18th June, 1846."

Soon after this Nachtrieb declared to several of the members, that he was glad to go away—was tired of the society—and that he did not depart from any compulsion. The property of the concern at this time, amounted to \$901,723.42, and there were 321 members. So that if Nachtrieb had received a full share of the concern, as on a division, he would have got about \$2,809.10.

In this state of things, Nachtrieb having married after his departure, and got children, now filed a bill in chancery—this suit—against the Harmony elders or trustees, setting forth his joining the society in 1819, being then 21 years old; his faithful and diligent labors in its business, receiving nothing in return but a bare maintenance; and that in June, 1846, being then 48 years old, and worn out with labor, he was wrongfully excluded from the society, turned out of its possessions, and deprived of participation in its property and effects, by the fraud, &c., of Rapp and his associates. The bill prayed an account “of the sums due complainant, *for his labor and services* in said association, and of the *share* he was justly entitled to, *in the property and estates* of said association, and *the profits* accrued during his membership, and that the same may be decreed to him.”

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The respondents, in their answer, admitted that the complainant was a member of the association, as stated in his bill, and that up to 1846 he had labored diligently in the affairs and business of the association, increasing its wealth and promoting its interest agreeably to the terms and spirit of their mutual compact—and that the association had prospered in its temporal affairs, having, from small beginnings, become the owner of property to a considerable amount.

It then averred that the complainant, during the period of his membership, enjoyed all the benefits, advantages, and comforts, individual, social, and religious, which were enjoyed by the fellow members, and all that were contemplated in forming the association and to which he was entitled by the terms and spirit of their agreements, and was entitled to be maintained, cherished, &c., by the association; one

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For the
society.

services for them. The right to recover for such services must be found, if at all, in the agreements. Such a claim could never have been contemplated by the parties. Running through a period of twenty-seven years, (twenty-one beyond the limitation provided by law,) against a voluntary association, whose members have been continually changing, by the death and withdrawal of some, and the accession of others, such a claim against the present defendants only cannot be sustained upon any known legal or equitable principles.

Conceding the value of the services, the injustice of allowing the complainant to recover for services rendered, is thus shown: He claims \$4,290 as compensation. The whole value of the property at the time he left was \$901,723.42. This divided by 321, the number of members entitled to community of property at that time, yields \$2,809.10. This deducted from \$4,290, would leave a balance of \$1,480.90 more in *his* favor than any remaining member would receive were the whole property of the Society divided *pro rata* among the members. Again, the property belonging to the society, June, 1819, when the complainant became a member, amounted to the sum of \$368,690.92. This sum deducted from \$901,723.42, the amount of property belonging to the society when he left, in June, 1846, would leave the sum of \$533,032.50, which, divided by 321, would yield \$1,660.53, which, deducted from \$4,290.00, the value of his services, would leave \$2,629.47 to be received by him more than the other members, or more than his share of the increase of the property of the society during the time he was a member thereof.

II. We consider the complainant's claim of a share of the profits while he was a member. The whole property of the society amounted, at the time the complainant left, to less than \$902,000.00. What, then, were the profits of the Society during the period of complainant's membership, from June, 1819, to June, 1846, a period of twenty-seven years? Deduct from \$901,723.42, the amount of property when he left, the sum of \$368,690.92, the amount of property owned by the society when he became a member, and add to the latter sum interest thereon for the period of twenty-seven years, and his share of the profits, if any, will be ascertained:

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society.

Amount of property owned by the			
society, in June, 1819,	-	-	\$368,690 92
Interest for twenty-seven years,	-	-	597,279 29
			<hr/>
Principal and interest,	-	-	\$965,970 21
			901,723 42
			<hr/>

Exceeding amount of property owned
by society in 1846, - - - \$64,246 79

And showing that during the twenty-seven years of complainant's membership the Society made no profits; but, on the other hand, taking into consideration the capital and interest thereon, there was a deficiency of said sum of \$64,246.79.

Equity would seem to require that the complainant should pay to the society his share of this loss, rather than that the society should pay anything to him.

III. Neither is the complainant entitled to an equal share of the whole property as it stood, when he left

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1855.

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society.

the society, in 1846. What was his interest in the property at that time? The character of that interest had been fixed and established by his own free and voluntary action. He had no individual right to it whatever; it was declared "forever joint and indivisible stock;" he could transfer no title to another; no interest could pass from him by devise or descent. He could only enjoy the property or benefits secured by his contracts so long as he continued a member of the association. How then can he obtain a decree for his share of the property? His right is to secure sustenance, &c., during membership; his claim is to recover compensation for services, and to a share of the property of the association, to be held and enjoyed in severalty. This he cannot recover, so long as he remains a member of the association, for the reason that no several enjoyment is permitted by the letter or spirit of the agreement, so long as he continues a member, nor afterwards, for the reason that the property is expressly declared by the agreement forever indivisible. The right to its enjoyment is incident to membership, and membership is essential to the right of enjoyment. Individual ownership and dominion, possession and enjoyment in severalty, are utterly inconsistent with the nature of the title, the quality of the estate, and the incident of tenure. The character of neither can be changed by the election of an individual, or without the assent of the owners. The validity of such an agreement as that entered into by Nachtrieb with the society is clearly recognized by the Supreme Court of the United States in a case very like this. *Goesele et al. v. Bimeler** was the case of some religious separatists from Germany, who founded a society at Zoar, in Ohio, on the principle of "a com-

* 14 Howard,
590.

munity of property." A member having died, his heirs sought to have his share of the property ; but McLEAN, J., in delivering the opinion of the court, declares that the ancestor of the complainant renounced " individual ownership of property, and an agreement was made to labor for the community, in common with others, for their comfortable maintenance ; all individual right of property became merged in the general right of the association ; he had no individual right, and could transmit none to his heirs." If he had no individual right, and could transmit none to his heirs, how, it may be asked, could he pass such right to another, or claim to enjoy it himself in severalty ? Yet that is what the complainant here seeks to do.

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1855.

For the
society.

So long as the complainant continued a member of the association, so long his right to the participation and enjoyment of all its stipulated privileges, immunities and benefits was complete and perfect. If he withdrew from the Society and ceased to be a member thereof, his interest in its rights and property ceased. If he were wrongfully and unjustly excluded from the association ; turned out of its possession, and deprived of all share and participation in its property and effects, its benefits and advantages, by fraud and combination, such exclusion and deprivation did not divest him of any property, or terminate any of his rights. His interest in the property of the society would remain precisely the same after such exclusion as it was before. Such exclusion could not change either its nature, duration, or extent, nor extinguish any of his rights.

IV. The complainant has, therefore, mistaken his remedy, which is restoration to membership. The society is bound in equity to the performance of its

AP'L SESSIONS,
1855.

For the
society.

contracts. By that contract the complainant was bound to contribute his services, if in health, for the benefit of the association; he was entitled to the enjoyment of its property whilst a member, in connection with the others, as joint and indivisible stock. He was entitled to food, clothing and sustenance when in health—to care, nurture and attention in sickness. He had a right to a home—the comforts and enjoyments of a home in the society. He could not be properly or legally deprived of these so long as he performed his own duties. If wrongfully excluded from the enjoyment of them, such exclusion could not operate as a forfeiture of property or termination of right of enjoyment. He claims, as Judge McLEAN says, that the heir of Goesele did, in the case already cited, “pay for his labor.” But the answer which the court gave in that case is our answer here also. “He has been paid for this in pursuance of his own contract. In sickness and in health he has been clothed and fed, and a home provided for him.” It is not pretended by the complainant in his bill that, up to the time of his alleged expulsion, the society had not performed all its duties towards him; that he had not received and enjoyed all that had been stipulated or promised. Then it is clear that, up to that period, no recovery can be had for services, when the entire stipulated compensation had been provided and furnished by one party, and received and enjoyed by the other. It is equally clear that no account can be taken, or decree promised, for subsequent services, for the very obvious reason that none were rendered. His appropriate remedy is, then, a restoration to the enjoyment of that which his contract promised and secured; a performance by the society of what it promised to

perform ; a decree for complete and perfect restoration to the enjoyment of the rights and property of which he had been improperly deprived ; a specific performance by the society of its agreement. This could be attained by petition and decree for restoration to the full and complete enjoyment of all his rights and privileges as a member ; by restoring him to the bosom and privileges of the society, a full, complete and adequate support by the society, under the order, direction and supervision of the court or its officers. In the case of *The Commonwealth v. St. Patrick's Benevolent Society*,* the Supreme Court of Pennsylvania ordered a peremptory mandamus to issue against the society, to compel the restoration of John Binns (who had been illegally and improperly excluded) to his standing as a member of the society. If a court of law could compel such restoration to standing as a member of a benevolent society, a court of equity can decree such restoration to the rights and privileges of a member in a voluntary association, whose articles expressly secure to the complainant the enjoyment of such rights and privileges, and bind the respondents to provide and furnish them. Such remedy is appropriate, but the complainant must seek it by a new bill, of different and appropriate structure and prayer.

AP'L SESSIONS,
1855.For the
society.* 2 Binney,
441.

After argument on the other side by Messrs. *Shaler*, *Stanton* and *Umbstaetter*, the opinion of the court was given by

For the com-
plainant.

GRIER, J. *On the first question ; the question of fact.*
—Although by the contract and agreement of the several members of this association, each had an equal right to and interest in their common property and

THE COURT'S
OPINION.

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had estopped himself from even setting up any claim for property or labor contributed to the common stock, in case of a *voluntary withdrawal from the society*; yet it contained no enumeration of offences by which a member should forfeit his rights and interest in their common property; it pointed out no tribunal which had a power to inflict the punishment of expulsion or forfeiture of all title to an immense property gained by their common contributions and labor. In dealing with rights of persons and property, the court can only look at the agreements of the parties, as written and signed by themselves. In these we have found no power conferred on Rapp to expel, at his mere whim and caprice, any unoffending or even offending member, and divest his title to the common property, after the labor of a life, spent in assisting to accumulate it. If he could expel *one* member in this way, he could another, and thus get rid of all the partners but himself, and retain the property for his own use.

That parties wrongfully expelled would have a right to the interference of courts of justice, has not been disputed. Nor has it been pretended that the evidence shows any case which could justify the expulsion of the complainant. He had been a faithful, diligent and laborious member of the association for thirty of the best years of his life, obeying every command and ordinance of Rapp, even to that of enforced celibacy. The only offence charged against him was holding a few minutes' conversation with some of his friends *out* of the society, who were anxious for some information as to the fortune of certain claims which they had made on the Harmony Society. No charge seems to have been made against him, save

that of *thinking and speaking* about the concerns of the society to which he belonged.

AP'L SEARSONS,
1855.

THE COURT'S
OPINION.

We come, therefore, to the point on which this case turns. Did the complainant voluntarily and of his own accord abandon and forsake the society? or was he wrongfully and unjustly excluded or expelled therefrom? As we have seen, there is no proof of any act of the complainant which would justify his expulsion. The argument has therefore turned entirely on the *fact* of expulsion or voluntary abandonment.

Nachtrieb's receipt, in which he in terms declared that he has *withdrawn* from the society, is much relied on; and so have his own declarations soon after he went away, that he had left the society voluntarily.

In regard to the receipt, when we consider the nature and extent of the authority exercised by Rapp, over his followers—their reverence and fear of him, and their unbounded submission to his command—it must be evident that the signature of such a receipt would be but slender evidence that the complainant acted voluntarily in withdrawing himself from the society. It is plain that if Rapp commanded him to go, he would feel bound to go, and that unless, after a servitude of thirty years, he was willing to go penniless, he must sign the receipt. It was the consideration for the means of departing without being reduced to beggary. As yet the complainant was not free from the shackles of the spiritual and temporal slavery to which he had been all his life subject; a power which forbade him to learn English, to marry, or if married, denied him intercourse with his wife. Free will can hardly be predicated of actions, performed at the command of a ruler believed to possess

AP L SESSIONS,
1855.

THE COURT'S
OPINION.

the keys both in this world and the next, and who taught that disobedience to his orders was a sin against the Holy Ghost, not to be forgiven, here or hereafter.

If the complainant departed from the society in obedience to the commands of Rapp, it may be said he obeyed them voluntarily, as there was no physical compulsion. But we may easily conceive of a social or spiritual excommunication, or a combination of both, which would leave as little choice to the party who feared them, as the rack or the inquisition.

So also the declarations of the complainant, that he went away voluntarily, can have very little or no weight against the clear evidence of his expulsion. This sort of testimony is seldom worthy of any reliance. It cannot be contradicted. Conversations are always but partially recollected, never truly stated, and often purposely misrepresented. Besides, if the conversations stated, were literally and strictly true they amount to nothing. I presume every member of this society felt uneasy, as to what would be the state of it after Rapp's death; and may well have doubted, whether a community of property can well exist without an infallible apostle with patriarchal or absolute power, so that unity may be attained by having but *one will* in the society. That the complainant after his expulsion, may have exulted in his first taste of the sweets of liberty; that he may have frequently said that he came away of his own accord, may well be admitted. Probably there are few instances, where a man has been expelled from any respectable society, in which his personal vanity would not soften the word *expulsion* into *withdrawal*, in speaking of his change of connection with it. An

expelled member seldom expresses much respect for those who have wrongfully ejected him, or affects to regret the loss of their society.

The plaintiff is therefore entitled to a decree, and the only question which remains is, what is the character and the extent of the relief which we shall give him. We shall not consider the objection to the form of the pleadings; for the case having been argued and considered on the merits, without objections, until a late time as to that point, we shall not go back to decide a game of sharps between the parties.

On the second question; the question of law.—The complainant demands pay for his labor during the time he was a member. This would be the extreme and longest rate of compensation. The defendants, on the contrary, without tendering in their answer a reconciliation with the complainant, and a restoration of him to his rights, or intimating a willingness to receive his wife and children as members, *now* insist that the court can decree no other remedy than restoration to his rights as a member. Such a decree would compel him, perhaps, to forsake his wife and children, for the small hope of the survivorship in the tontine. This, we think, would be rendering very scant justice or recompense to a man for half his life's labor. The Pennsylvania case cited has no resemblance to the present. That was a corporation for benevolent purposes, where membership and not the ownership and enjoyment of property to the corporator's own use, was the object. Its members accumulated to give away, or to expend on charitable purposes. These accumulated for themselves. They have, by joint labor, accumulated property of great value, which they hold as joint owners. The com-

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1855.

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OPINION.

plainant had an equal ownership with his three hundred and twenty partners. By their contract, it is to remain joint and indivisible stock forever, but the complainant has his right to enjoy it equally with his fellows. Their articles of partnership or association provide for the case of any partner who chooses to withdraw or depart from it; but makes no provision for those who are unjustly driven away and expelled. Whether the society be governed by prophet, priest, king, or majority, they are subject to the law of the land; and if the complainant has been wrongfully deprived of valuable rights of property, the law should afford him a remedy. I know of no other measure of satisfaction or compensation more just than to give the expelled and injured party his several share of their joint assets. The dissolution of the partnership by the wrongful act of the majority of the firm or association, necessarily dissolves, *inter sese*, viz., as between the expelled and the remaining partners, the covenants as to the indivisibility of their joint property. If this were otherwise, a majority could at any time expel the minority, and retain all the joint property. They who break the agreement as to perpetuity of the benefits of membership, cannot be heard to allege it as to destination of the property. By their wrongful expulsion of the complainant, the whole power and force of the articles as between them is broken, and *inter sese*, annulled; and the complainant has a right to the separate use of his heretofore undivided interest in the property, because he is wrongfully deprived of his joint use of it. The wrong done to plaintiff, is capable of a compensation in money, without compelling him to leave his family, and spend his days

among those who have injured him. And the proper measure of his compensation is the amount of his interest or share at the time of his expulsion. It is not like a mere corporate privilege or office, to which a court of equity may restore a corporator who has been wrongfully expelled. It is a question of the enjoyment of property. His copartners have ejected him from his joint use and enjoyment of their common property; they have severed the tenure, as between him and themselves, and he has a right to his share in severalty. This is the proper measure of the complainant's compensation, and not wages for his labor during the time of his membership. Let the decree be for the $\frac{1}{3}\frac{1}{2}$ part of the whole property of the society, \$901,723.42, at the time of his expulsion, with interest from that date; deducting what the complainant has received.

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1855.
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OPINION.

DECREE ACCORDINGLY.(A)

[AT PITTSBURG, EQUITY DOCKET, NO. 28, NOVEMBER TERM, 1849.]

(A) In a case brought by another complainant against these same defendants, there being *imperfect evidence of any expulsion*, and the defendants by their answer, "conceding the complainant's perfect right and liberty to return to the enjoyment of all the privileges, benefits, and advantages contemplated by the association, he discharging the duties incumbent on him as a member of it," the court refused to grant the complainant any relief, but dismissed his bill with costs. *Lamitz v. The Harmony Society*.

TURNER v. HAND.

[WILL: FORGERY: HANDWRITING: TESTATOR'S DECLARATIONS
AND SANITY: DEPOSITIONS IN OTHER SUITS.]

Proof of forgery derived from knowledge of handwriting, though very strong indeed, ought not to control positive, and unimpeached evidence of an actual execution.

Strong evidence of the forgery of a will being given, the declarations of alleged testator, after the alleged making of the will, as to the mode in which he had disposed of his property, are evidence, such declarations being offered as a fact or circumstance tending to prove fraud and forgery, by showing that the alleged testator had no knowledge of the existence of such an instrument. But such evidence is not generally admissible; is dangerous in its effect on a jury, and ought to be controlled by the charge and powers of the court.

The deposition of a witness, deceased, taken in the Prerogative Court on a caveat against a will, may be read in an ejectment, where the plaintiff in ejectment claims title under the person who was an executor of the will and propounded it for probate, and where the defendant is one of several caveators; but the record of the court is not evidence to show what the decision was on the validity of the will.

On a question of a testator's mental capacity, the court should look to his substantial business acts more than to his conversations, or occasional doings not connected with business. The fact that he is eccentric, excitable, passionate and very nervous;—is on certain subjects believed by many to be insane, through excited feeling—that he believes in spiritualism, the book of Mormon, or in Fourierism; may talk very much like a fool; have visions and believe in them, is not enough to show a want of sound and disposing mind and memory, provided he attends constantly to his business, and manages it with capacity, care and skill; and in other practical respects appears to be of sound mind.

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1855.
STATEMENT.

This was an ejectment, in which the plaintiff claimed title under one Boylan, whose title depended on the fact whether a certain paper of several leaves, signed on each leaf, and dated January 12th, 1852, was the will of Jonathan Meeker, a man of large fortune in New Jersey, who died in 1853, at the age of seventy-

six. The defendant's positions were, 1. That the will was a forgery. 2. That if not actually a forgery, the testator when signing it, had not been of sound and disposing mind.

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The execution of the instrument having been formally proved by one Mrs. Hoyt and her three daughters, who with her husband, now deceased, professed to be the subscribing witnesses; the defendant thus attempted to prove it an absolute forgery. One *Clark* had known Meeker for forty years; lived in the next house to him; had seen him write for thirty years; was as familiar with Meeker's handwriting as with his own. "My opinion is he never made one of those signatures. It is plain to me he never wrote them. There is a peculiarity in them not his." *Valentine* had known Meeker and his writing from his youth up; did not believe the signatures to be his; never had had but one opinion from the time that he first saw them, and that was that the signatures were forged. *Bonnell* had frequently seen Meeker write; thought the signatures not genuine; thought them in a better handwriting than Meeker's. *Wilcox*, a justice of the peace, had done business with Meeker for thirty years; had seen him write very often, and did not believe the signatures to be his. *Ball*, a constable, had known Meeker intimately for fifty years; was in the office of Meeker, who was a magistrate, for thirty-six years, and as constable did his business; was very familiar with his handwriting, and did not believe any one of the signatures to be his; believed every one of them forged. *Day*, who had had considerable dealings with Meeker, and so was familiar with his handwriting, also believed the signatures forged. *Wood* had seen Meeker write frequently

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of late years, and did not believe the signatures genuine, they having, in his opinion, been written by some hand less tremulous than Meeker's. *Runnion*, a lawyer, had been frequently employed professionally by Meeker; had often seen him write; had seen him write with all sorts of pens; no signature of his that the witness had ever seen was like any one of those on the paper alleged to be his will. They were all of a hand less steady; and "my opinion is that the signatures are not his." *Crane*, a Methodist clergyman, had seen him write; had examined the paper several times, carefully; "I do not believe it genuine," he said; "I do not believe any one of the signatures to be his handwriting." *Tully*, another Methodist clergyman, very intimately acquainted with Meeker, had examined the paper twice before, and had made up his mind as his "deliberate opinion, that Squire Meeker never wrote those signatures." *Townley*, familiar, &c., thought "the signatures resembled his, but were not his." *Crain*, familiar, &c., thought them *not* like any of his of late years, and therefore a forgery. *Magee* thought the signatures did resemble his, but were not his, being all of them smoother and better than any which the witness had ever seen of his.

All these witnesses were intelligent, credible and unimpeached.

The paper alleged to be Meeker's will, left the property which was the subject of this ejectment to one *Boylan*; no relation, and who with Meeker's widow, were sole executors. It did not leave anything, or but a small amount, to a nephew of Meeker's, *Jonathan Meeker Muir*, hereafter mentioned; nor did it found or endow any Methodist *Institute*, also spoken of hereafter; though it left \$1,000 to a Methodist

Church. His widow was left with a small sum, and his blood relations generally were cut off.

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1855.

First Point of Evidence.

The defendant's counsel now proposed to ask of witnesses this question: "What conversation had you with Jonathan Meeker, before and since February 12th, 1852 (the date of the alleged will), respecting the disposition of his property by will;" the purpose of the question being to give in evidence the declarations of Meeker, both before and after the date of the alleged will, as to the dispositions he had made of his property, and the evidence being offered as a fact or circumstance tending to prove that the testator was ignorant of the existence of any will such as was contained in the paper offered in evidence; that this paper, containing dispositions was wholly incongruous with his often expressed testamentary intentions; and so in connection with other facts proved and to be proved, to sustain generally the issue of fraud and forgery.

Mr. Bradley against the admission of this testimony, relied much upon the English case of *Provis & Roe v. Reed*.^{*} In that case where the question was as to the due execution of a paper purporting to be a will, proof was offered that the so-called testator had said, "Tom Reed (the defendant in the case) has been trying to get my property; but neither he nor his, shall have it My land goes to my own family. Peggy! (one of the defendants) remember the land is yours. If I don't live to make my will, when I am dead, see that you are righted." The evidence was

^{*} 5 Bingham,
485 (15 E. C.
L. 491).

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rejected. Park, J., says: "The evidence of declarations of the testator incompatible with the validity of the will, was properly rejected. When the Legislature has taken such care to prevent fraud in wills, and when it is considered how easily declarations may be extorted by artful persons after the intellect of a testator has been impaired by time, it would be most mischievous and *a violation of all established principles* to allow such declarations to be received in evidence." Of this opinion was the rest of the court.

2 Johnson, 31.

The American case of *Jackson v. Kniffen*,* in the Supreme Court of New York, when Kent was chief justice of it, and Livingston and Thompson, justices, is to the same effect; and parol evidence of the declarations of the testator, that he had executed his will under duress and now revoked the same, though these declarations were made in the moment of expected dissolution, and under circumstances of such solemnity that they would have been received on a question of life and death, in a court of criminal jurisprudence, the majority of the Supreme Court of New York, after full consideration declared them inadmissible: Spencer, J., alone and "with diffidence" dissenting.

GRIER, J. Testimony of the sort proposed is, generally speaking, not admissible; but when you have strong proof that the paper offered as a will is a forgery, and the issue is fraud and forgery, I think it is competent, as *tending* to prove the issue. It is, however, a somewhat dangerous kind of evidence; and a court must hold a tight rein over it, in charging the jury as to its legal effect, in relation to the positive and unimpeached evidence of execution.

QUESTION ALLOWED.

The evidence being ruled admissible, it appeared that Meeker had told *Valentine*, about the time of the alleged disposition, and also not very long before he died, that he had left a certain ten acres described for the site of a Methodist seminary or institute, and \$5,000 for the erection of a building, and \$5,000 to endow it; that he had left to his nephew, J. M. Muir, other property worth \$10,000. He had told *Corey* also, that he had left money for the Methodist seminary, but none for the church. To him he had always spoken highly of his family connections, especially of his nephew, Muir, of whom he said that except his own wife, he was nearest to him in his affections, and that he leaned on him as he got old for counsel and for help. Of *Boylan* he said that he was a "d——d scoundrel, and he would not trust him with a dog's dinner." He told *Clark* that he had left money for the seminary, though none for the church, because the church society would not come up to his views; that he had left land worth \$10,000 to his nephew, Muir; and that Muir and his wife were his executors; that he had kept a will by him for forty years. To *Lewis* he had said, after the execution of his alleged will, "Do you know *Boylan*? I would not trust him for one cent. He is the devilishest rascal in the world;" and said that one *Hoyt*, hereafter spoken of, and *Boylan* were attempting "to come some game over him," and that he did not mean they should; that he would once have trusted *Boylan*, and have made a man of him if he had done right, but not now. "He always told me that *Muir* was to be his chief heir." To *Lowe* he said, that he had made his will, and had left \$10,000 for building and endowing a seminary; \$5,000 for each; and getting out a map,

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showed him the location of the site for it; said that his executors were his wife, Muir, his nephew, and James and Isaac Meeker; that it was the last will he should ever make, as he was old and feeble; spoke of Muir as a very smart man, who had done more for him than all his relations, and to him especially always expressed himself kindly and affectionately; "his blood relations," said this witness, "were a great hobby with him, and he gave as a reason why he would leave me nothing, that I had no Meeker blood in me." Of Boylan he said that he was a d——d rascal, who, while professing to be his friend in a quarrel he had with the town council of Newark, was in fact against him and working for the other side. To *Wilcox*, whom he met in the street, after February, 1852, he offered to show his will. "It is of no interest I guess, to me," said Wilcox, "since I don't believe you have left me anything." "No," replied Meeker, "I haven't left you anything; for you have no Meeker blood in you. I have left it to my nephews." To *Johnson* he stated that he had left \$10,000 for the erection and endowment of the seminary; and that Boylan was a d——d cheat, who would rob him of all his property if he could; that he had paid him to attend to his business, but that he did not attend to it at all. To *Searles*, that Boylan was "a nasty, good for nothing, dirty, little puppy; that he had cheated him out of a place in Newark, and would do the same again if he got a chance." To *Runnion*, who advised him to have Boylan attend to some business for him, he said, "I won't; he is a villain, a d——d rascal. I have no confidence in him." When *Brewer* said he did not know Mr. Boylan, "you need not want to know him," replied Meeker,

“he is a dishonest man.” To *Tully*, the Methodist clergyman already mentioned, and very intimately acquainted with him, and seeing him frequently, Meeker, “at every interview in the latter part of his life, uniformly expressed a determination to have the Meeker Institute accomplished. It seemed to be one of the hobbies of his old age.”

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It would be tedious and of no use to go through all the testimony in the case. Many other unimpeached witnesses were examined for the plaintiff, all of whom testified to the same effect as those whose names have been stated.

On the side of the defendant, it appeared, contrary to what Meeker had stated to the persons last named, as to the disposition of his property; that to *Dr. Lord*, a physician of character, who had known him very well in the last few years of his life, he spoke disrespectfully of all his relations; said that they wished to rob him; that he had done a great deal for them. *Dr. Lord* had seen Meeker often at *Boylan's* office, and had heard him speak of *Boylan* as “my friend *Boylan*.” He frequently spoke of the Methodist or Meeker Institute, and of his intention to endow it, until the latter part of his life, when he said that *he had abandoned the project*. He said this in an interview very shortly before his death. To *Law* he said, that one *Whitehead* *had* been his lawyer, but that *Boylan* was so now; that *Boylan* had treated him well, and he would remember him for it: to *J. A. Johnson*, that he meant “to make a man of *Boylan*, but did not mean that he should know it, as it would make him too saucy;” that his nephew, *Muir*, did not know how to manage a farm. “He was always complaining,”

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said this witness, "that his relations would not take care of themselves, and that he had helped them until he was tired." To *Fort*, a Methodist clergyman, who resided about five hundred yards from him, and visited him as a spiritual adviser in his last illness, he said that he had given a legacy of \$1,000 each, to two churches, a Presbyterian and Methodist; that his connections were Presbyterian, he himself a Methodist in his opinions; and described the mode of raising the legacies essentially as found in the paper in controversy. Of *Boylan* he spoke respectfully; called him "my friend *Boylan*;" said *Boylan* was doing business for him; wished the witness to become acquainted with *Boylan*, and offered to give to him a letter of introduction. To *Mrs. Trimble* he spoke in the kindest terms of *Mrs. Boylan*; said that she had always treated him most kindly, and that he meant to do something for her husband.

On the matter of the signatures, several witnesses, not the subscribing witnesses, but acquainted with *Meeker's* handwriting, were examined, all of whom gave their opinions, derived from such knowledge, that the signatures were genuine; most of them thought them *his*; others thought them like his, and without any great difference from his ordinary signatures; a "little firmer," perhaps, than in most cases, but no great difference; "a little better than common, perhaps, but his," &c.

The history of the execution of the will, was as follows: *Meeker*, being aged seventy-six, and in such a state of health and mind as is hereafter mentioned—a feeble bodily health, confessedly—had gone on a cold winter's afternoon, ten or twelve miles from his

own house in New Providence, to one Hoyt's, a person of some social condition, with whom he had but recently become acquainted. Hoyt, it appeared, was a garrulous, foolish, lying person, but one whose moral character was not otherwise open to impeachment. Meeker's going so far from home alone, at his time of life, and in feeble health, on so cold an evening, had attracted remark from more than one person along the way who met him, and one of whom had remonstrated with him at the exposure. He went on, however, and reached Hoyt's. Neither Hoyt nor any of his family were related to Meeker, nor they or their relations or friends, beneficiaries under the will, or acquainted otherwise than by name with most of those persons.

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The history of the execution of the will was given by a subscribing witness, one of Mr. Hoyt's daughters, essentially as follows: "Mr. Meeker was an acquaintance of father's. He had visited at our house; had dined and taken supper there several times, for some two or three years, perhaps more, before the time I am about to speak of. He executed a paper at our house, which he said was his will. It was in January, 1852, I think on a Monday. He came in a sleigh, with two horses, alone, about dark, about dusk; before tea. He took tea with us. It was a cold, snowy, stormy night. He said he was afraid the storm would spoil his new blue horse-blankets; wind was high. A servant received him at the front door. I saw him first in the dining room. The family were there. The family consists of my father, mother, two sisters, myself, my aunt and grandmother. I can't recollect whether grandmother was there or not. Father was not at home when Mr. Meeker arrived;

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he had gone to New York that day, and did not return, I think, until after tea. When father had got his tea, Meeker asked him to go into an adjoining room. After being absent a half hour or more, they came back. Mr. Meeker had a paper in his hand, which he said he wished to execute. He sat down by the table and requested pens and ink to be brought, and that some one of us would witness the will. Before the old man signed it, there was a long discussion about its contents; he read it over loud to us. I think the first thing he remarked on was what he had given his wife. Some one said it was a mere pittance. He said it was more than he had given her in other wills, and was very liberal; that she already had more property of her own than she needed; that he had given her money for signing papers, which she had laid up. Father said that she had been as economical as he, and had enabled him to grow rich, and ought to have more. What brought father's remark out, was Mr. Meeker's saying that the provision in this will was very liberal. I remember a legacy to some one named Muir. He said that Muir would be expecting more than he got; for he had always been hanging about him; he gave as a reason for not giving him more, that Muir had over-reached him. I recollect a provision for a niece who was in an insane hospital, and a legacy to a colored girl named Violet. [Both these provisions were in the paper in question.] He remarked that he had given his brother nothing, because he had enough already, having only one child, a daughter. Father said that he had given too much to Mr. Boylan. There was a good deal of discussion about him. He said that 'Bylan' was a young man of considerable promise,

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and he would give him a lift: and that he liked 'Mrs. Bylan,' and urged us to become acquainted with her. Meeker brought the will ready drawn: he said it was drawn by a lawyer in New York. I don't remember his name. When father made a suggestion about Mr. Boylan, the old man said that he had made up his mind before he came and didn't want to be dictated to. I remember one or two bequests to churches; one to a Methodist church, I think. I remember no more except that there were bequests to some of his friends; their names I don't remember. I knew none of them. Father said, jestingly, that he ought to have left us something. He said we had enough already. I remember his saying that he had intended to leave something for a public school, but that he had changed his mind; that they would be ungrateful and would not care for him enough to put a grave-stone over him; that he did not wish the people of New Providence to know it, for that if they knew he had left them nothing, they would be mad enough to ride him on a rail. After the pens and ink were brought, he requested my father to write something at the end, which he did. After my father had written what he requested, Meeker wrote his own name. He asked for a seal. I cut the seal paper at his request. He put his finger on it and declared it to be his last will and testament for the purposes therein mentioned. He asked me to witness it; I made some apology and declined. My father proposed to go for some one out of the family; also proposed to take it to a lawyer in Elizabethtown, whom he named, and have it witnessed there. Father said he would rather have nothing to do with the will. The old man objected, said he wanted it executed at our house to keep it a secret;

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that he wanted a private will ; that his relations were always talking about the disposition of his property, and that he was determined to make a will they should know nothing about ; that he knew we were not acquainted with any of his relations, except Mr. Meeker at Elizabethtown. He then asked my sister Anna to witness it. Father and mother both objected, and mother proposed that father should go for Mr. Brown, a neighbor ; and I think that father set off, or made some movement to go, but desisted because the old man seemed so vexed about it. It was snowing and cold. He said that any young lady might consider it an honor to be asked to witness his will. After that my sisters signed it. He then asked me again to sign it. He said he had a fancy to my name, that it was the name of his wife. I finally did sign. Father witnessed it. He is now dead. I remember that Mr. Meeker signed his name on several leaves ; he said it was the custom, or his fancy. He said afterwards that he wished to have no mistake. He tried several pens to get one to suit him. There were gold pens and quill pens on the stand. I do not know which he used. But he said he could write better than any of us ; that he would have to take pains, so many ladies looking on. The will was executed between seven and nine o'clock in the evening. After father, mother, I and my sisters had all signed, it was put under a cover, an envelope, and the old man put it in his pocket-book. All the time that I remained in the dining room, Mr. Meeker was talking about the dispositions which he had made in it of his property. I retired before him. I do not know when he and father retired ; I left them, and I think, the rest of the family in the dining room. I saw no

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more of the will, until two or three weeks after it was executed; when I saw it in an envelope in a drawer in my father's desk, where he kept money and his private papers; and several times afterwards. I saw it whenever I happened to see the drawer opened. I often assisted my father to arrange his papers, and he opened the drawer when he wanted money. It was endorsed 'Jonathan Meeker's will.' There was something written on it about its being opened ten days after the decease, [an endorsement which was on the paper in question]. The day my father went to the funeral, he proposed to take the will with him and give it to Mrs. Meeker. Mother told him not to do so. Father said he would be glad to get it out of his hands, and that as Mrs. Meeker was one of the executors, she ought to have it. Mother said that as he had taken charge of the document he should do as he was directed, and keep it till the tenth day. Ten or eleven days after Mr. Meeker's death, my father took out the will, broke the seal of the envelope, and requested me to write to Mrs. Meeker, to say that he was going to deposit the will with the Surrogate at Newark. I went with him for the ride. I recollect hearing the will read when taken out of the envelope. I recognized it as the one read over at our house by the testator. I have no doubt whatever of its being the identical paper now shown to me, nor that the seal paper is the one which I cut, and the signatures the respective signatures of Mr. Meeker, my father, mother, my sisters and me."

This account was confirmed with slight circumstantial additions and variations by the mother and two other sisters; the father, the remaining subscribing

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witness, being dead. The narrative of all these ladies was given with great apparent candor, and was not affected unfavorably by long and severe cross-examination. One of the witnesses stated that the signatures were made with a gold pen.

Second Point of Evidence.

Second point
of evidence.

The defendant's counsel now proposed to read the depositions of certain deceased witnesses, which had been taken in the Prerogative Court, in a suit there upon a caveat to this will, it being shown by the record of that suit, that Boylan, who in this suit was *grantor*, had in that one, as executor of the will, propounded it for probate; and that the defendants here were among the caveators there. The plaintiff's counsel objected to such depositions being read, as the question in the Prerogative Court regarded personal property and not the realty, and as the record showed that in that suit there were other persons caveators, who are not parties at all in this one.

GRIER, J. The parties were substantially the same, and the issue was the very same; st. "Is this the last will and testament of Jonathan Meeker?" The record of the Prerogative Court may be considered in evidence for the purpose of the offer; but not to show what the decision there was as to the validity of the will.

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The Prerogative Court had decided against the genuineness, a fact not allowed to be given in evidence, but one of common knowledge about the place of trial.

Principal Case Resumed.

In respect to the mental capacity or sound disposing mind and memory of Meeker, the testimony was not perhaps entirely consistent. It showed clearly that he was very eccentric, nervous and excitable; and that he was a man of violent passions and prejudices. A few years before his death, the town authorities of Newark, without his consent, and in violation probably of law, had taken some of his property for a public park; a matter on which he became almost maniacal. "When he got talking on that subject, he became wild," said one witness; "incoherent," said another. "You might as well touch a keg of gun-powder as say 'park' to him," was the testimony of a third. "He became perfectly crazy on the park business; wished to raise an army and make a revolution," said a fourth, who thought him "failing in mind and body, and not fit to attend to any business." Boylan, whose name has been so frequently mentioned, was Meeker's attorney and counsel about the park business; which Meeker, by his will directed should be carried to the courts of last resort. So, too, it appeared that "he was restless and wild about all railroads." "His conversation was frequently incoherent and foolish." He became, at one time, very vehement against the Court of Chancery; always calling it a court of iniquity. In the time of President Jackson, he had been a great admirer of that gentleman, until, having sent to him a plan for a bank of the United States, without receiving from the President any answer, he became highly offended, and his views of the Jackson policy underwent a complete change. He often adverted with great feeling to the President's breach of de-

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corum in not replying to his letter. At a later date, and not very long before making his will, he told one *Love*, "of a vision he had had when awake, of a great white throne, on which there were many fine ladies; of all of whom his wife was the prettiest. He (Meeker) was king and she was queen." "He was in earnest," added the witness. About the same time, "he would try to play on Pan's pipes." "He acted strangely," said the witness. "I thought him failing every way, that his mind had failed with his body." On another occasion, "he took out a promissory note for \$1,000, and *offered* to give it to me," said another witness. "I thought him partially deranged *on that day*." "Towards the close of his life—both before and after he made his will—he had many visionary notions about property; when near seventy-five years old, and failing visibly in body, he talked about his building factories, and having water-powers; he said he wanted to make money—wanted to get rich, and thought he could become so by making spools out of dog-wood."

On the other hand, it appeared that Meeker was naturally "a shrewd, rough man"—"eccentric, but strong minded"—"might have been a superior person, if well educated"—that although he talked very foolishly and wildly, had visions, &c., he acted with sagacity. Hoyt, at one time, wanted to borrow money of him, and used some address to get it without mortgage, but did not; nor did he give the man the \$1,000 note which he offered to him. "During all the time near which he made his will," said an intelligent witness, "he was about attending to business. Sometimes he did well enough; generally well enough in ordinary matters. When calm, he knew perfectly what he was doing, and was capable of understanding

his relations in life; but when he became excited, he seemed to lose his faculties. The park was the exciting matter; he would become so excited about it, that he hardly knew what he said. But he was not alone in his views about the conduct of the town authorities of Newark, in their mode of obtaining ground for the park. It was an exciting public topic. Town meetings were held to condemn the councils; the papers of the day are full of it. No one else behaved, however, like Meeker, who, on that subject, in my opinion, could not be called sane. On other matters, and especially on matters of property, he acted with sagacity enough."

The testimony as to his conduct on the evening when he came to Hoyt's, and there executed the paper in question, has been given. The witnesses to the will testified in substance that, so far as they could judge, he was a man naturally of a sharp, strong mind, strong will, very positive about his own affairs, but was not excited nor agitated about anything specially on the evening that he was there. He slept there that night, breakfasted there the next morning, and afterwards drove away with Hoyt, the father. His moral character was summed up by one witness. "He was tedious in conversation; dogmatical and arbitrary in all his views; selfish, lying, avaricious, domineering and dictatorial; he hated a poor man, despised his superiors; abused everybody, and spoke well of everybody at different times, according to his humor."

After argument the jury was thus charged by

GRIER, J. The issue is whether this paper of 12th of January, 1852, purporting to be the will of Meeker,

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is his will or not. It is an issue of fact, and one to be resolved by the jury on their own responsibility.

I need not, perhaps, remind you, that in order to perform the duty which you have sworn to perform, in rendering a true verdict, in this case, it will be your duty to apply the principles of law involved in it, and weigh the testimony which was had before, with cool, calm and unprejudiced minds. Let no pressure of public opinion—no rumor which may have come to your ears of the supposed decision of any other tribunal, have the slightest effect or influence on this case. There is no greater evil in the administration of justice than that men's liberty or property should become the sport of mere popular impulse or public prejudice.

There is another principle that never should be forgotten by jurors and judges, and one which I know by experience, we are sometimes tempted to overlook—viz.: That we are performing a duty entrusted to us by the law, not exercising an irresponsible power. The rights of property depend upon the law, and not on the caprice or discretion of a court or jury. The law gives to every man the right of disposing of his property by deed or by will. And if the instrument by which this disposition is executed be in due form of law, by a man of sound and disposing mind and memory, without fraud or coercion practiced on him, neither court nor jury have a right to set it aside, on the supposition they could make a more just and equitable disposition of his property. The law has not committed to us the power of disposing of men's property as we please. That courts and juries are sometimes tempted to forget this principle my experience has amply shown me. I have seen it in the jury box—I have seen it on the bench—I have felt it—I have had

to struggle against the feeling. We easily believe what we wish to be true. We are prone to be satisfied with light proof, or any fallacy in favor of a preconceived opinion, prejudice or feeling. When we suffer ourselves to be thus tempted, we act as tyrants, not as judges.

The question for your decision then, is,

Did Meeker sign, seal and publish this instrument as his last will and testament?

If the testator in the right use of his faculties has executed the instrument in due form of law, it is not in the power of court or jury or both together to treat it as null and void, and make a different disposition of his property to suit our notions of justice or propriety. A rich old man may marry a young wife or a handsome and obliging housekeeper, or maid servant—he may disinherit his own children and leave them beggars. You and I may think his conduct oppressive and unjust in the highest sense; yet if it be his will, we have no power to set it aside. It is true a will may be so outrageous, so contrary to the known desires and wishes of a testator, so absurd on its face, as to indicate or even demonstrate the want of sanity in a testator who could be guilty of signing such an instrument. But it must be a very extreme case to justify the rejection of a will on this account.

It would be a very dangerous practice if courts were to allow the parol declarations of a testator to be given in evidence to a jury in order to set aside a legally attested will. Why does the law require certain solemnities in order to a valid testamentary disposition of property? It is because of the fraud and perjuries which would be a necessary consequence of suffering a man's property to be the sport of loose conversations.

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Old men who have the misfortune to be rich and childless are often so situated, that it becomes necessary to their peace and comfort, that they should conceal their intentions entirely from the wide circle of collateral relatives, beggars for the church, and others of like character. His parol declarations may be, and often are made, directly contrary to his real and secret intentions, and for the very purpose of concealing, not of testifying his mind or intention. Hence many judges have wholly refused to suffer such evidence to go before a jury for any purpose whatever, as tending to introduce the very evils which the statute of wills was made to guard against.

Our titles to land should not depend on hearsay, for next to mere opinions, the testimony of conversations is a species of evidence the least to be relied on.

1. It cannot be contradicted; the witness may give the widest stretch to his fancy or imagination, and he cannot be convicted of perjury.

2. Very few persons can recollect or repeat verbatim what they have heard another say. A witness gives his own version, in his own words, of general impressions, rightly or wrongly received.

3. The witness may recollect a part of a conversation, and yet that part may be an entire misrepresentation of the whole.

4. He may omit very small, but very material words, such as "if," "not," &c., &c., which entirely alter the whole complexion and meaning of the conversation—make absolute what was conditional, and positive or affirmative that which was negative.

I must say, after long experience, that I always deeply regret to see rights of property, or men's lives,

or liberty, to depend in any measure upon testimony of this nature.

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You may then very naturally inquire if such be the law with regard to wills, and such are the dangers to the rights of property from admitting the declarations of testators to be given in evidence to affect their written will proved in due form of law, why has the court permitted such testimony to be laid before the jury? It is right, therefore, that the court should explain to you on what principle this was done, that you may give this evidence its proper weight and application, and not be led into error by an improper appreciation of it.

While it is undoubtedly true that parol declarations of a testator made before or after executing his will, ought not to be received as a ground for altering or annulling it, yet cases *may* arise where such declarations, in connection with other circumstances, may be taken into consideration, as for example, where there is strong evidence of conspiracy and of fraud practiced on the testator, or that the instrument is forged and false.

In order to elucidate this principle, let us suppose a case. A will is produced in court, regularly proved according to law, yet notwithstanding the legal proof, it may possibly never have been seen by the testator, never have been signed and sealed by him, and, consequently, does not contain his will as to the disposition of his property. Suppose it to have been made (as has sometimes been the case in Ireland and other places) by some person personating the testator, and simple, and perhaps honest people, have thus been prevailed upon to attest it. In such a case, the signatures may be so palpable a forgery as at once to

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detect the fraud to any judge of handwriting. Again, suppose the will disinherits a child, a grandchild, or other relative, who has been the favored and beloved companion of the testator's life, whom he had uniformly pointed out, and always, and invariably, through his whole life, declared his intention of making his heir, and in whose favor a prior will was duly executed. Suppose the devisee in this supposed will was some worthless fellow, unknown to the testator, or, if known, despised or abhorred by him. Suppose the witnesses to be of the same character, low and degraded, with whom the testator never associated. Would not such facts, if clearly proved, condemn such instrument in the mind of every rational man? Would not the moral impossibility that the testator could ever have made such a disposition of his property, be sufficient to outweigh the positive testimony of such witnesses? It is easy to forge the handwriting of almost any man, so that it may be almost impossible for the best judges to discriminate between the false and the true, and it is too true, that persons may be found willing, for a sufficient consideration, to swear to any statement of facts. Fraud can be generally proved only by circumstantial evidence. A number of distinct facts, clearly proved, may be so utterly inconsistent with the truth of the instrument, as most satisfactorily to establish the fraud. The fact that the testator had uniformly, through his whole life, declared that he intended a certain relative to be his heir, that he made his will in his favor, may be an important link in the chain of circumstances from which fraud, perjury, conspiracy, and forgery, may be clearly proved.

It was for this reason, that when the defendants

opened their case, and proposed to prove fraud and forgery by a chain of similar circumstances, the court permitted this testimony of the declarations and conversations of the testator to be given in evidence.

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Let us now proceed to a more particular examination of this case. In doing so, it is not our intention to examine or compare the immense body of testimony, relevant or irrelevant, with which this case has been encumbered. But we think it our duty to notice some of the leading facts of the case, hypothetically, and to point out to you the weight and effect these should have on your verdict, accordingly as *you* may find them to exist.

How, then, shall we take up this immense mass of testimony, to avoid confusion of ideas, and give to the testimony its due weight and effect?

1st. For this purpose, you will first examine the testimony in support of the will. Is it sufficient in law, and credible, so that standing alone, the will ought to be established without hesitation?

2d. What is the defence set up against this paper? Is it so clearly established by evidence, as to convince our minds that the testimony given in support of the will is false, and that there is a chain of undoubted circumstances, which makes it morally impossible for the jury to believe the witnesses to the will, or that this paper contains the true will or intentions of the testator?

You must remember, that the burthen of proof is on the party who alleges fraud. That fraud, though proved by circumstances, can never be presumed—for fraud is a crime. It is not enough to show suspicious circumstances. Suspicion is not proof. It does not

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fraud upon any transaction.

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There is a very great and sometimes grievous error into which not only the public mind, but that of jurors and judges too, are apt to fall; and which leads to false judgments, and sometimes to great oppression. I would, therefore, specially call the attention of the jury to it, and caution them to beware of it. It is this: The law abhors fraud. Every honest mind hates it, and even those who practice it themselves, will join in the denunciation of it. It makes them feel virtuous for the time, and they are the most ready, from the arguments of conscience, from judging of others by themselves, to believe it true, and inveigh most loudly against it. When the clamor of fraud is raised in a community, or when it is confidently charged by counsel in a court, we are prone to see all facts through a false medium, which *magnifies* the importance of every fact from which suspicion of fraud may be raised, and ignores the plainest inference against it. In the midst of our virtuous indignation against fraud, we first assume it has been committed, and then seek for arguments to confirm, not our judgments, but our prejudice. "Trifles, light as air," then become "strong as proofs of holy writ." Circumstances which to an unprejudiced mind are just as compatible with innocence as guilt; which at best could only raise a suspicion, are set down as conclusive evidence of crime. Those who sit in judgment over men's rights, whether as courts or jurors, should beware of this natural weakness to which we are almost all of us subject. We all fancy ourselves wiser than perhaps others are willing to give us credit for. This feeling is gratified by what we

believe to be superior sagacity. Rogues may be cunning, but they can't deceive *us*. Under this satisfactory belief, we become over-astute, and often see that which is not to be seen. We suffer our imaginations to take the rein from our judgments, and rush headlong in this chase after the fox called fraud. Circumstances which should avail for the proof of fraud, are such only as are inconsistent with a contrary view of the transaction, and lead irresistibly to that conclusion.

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We have before us a will proven by *five* witnesses, all present at its execution, and all agreeing in every material circumstance which can affect its validity. You must bear in mind, that the best possible evidence of the execution of any instrument of writing, is that of the subscribing witnesses and other persons present, who swear that they saw it signed. They swear to facts, and not to opinions, and if they are credible witnesses, whose character for veracity stands unimpeached, it is the only safe and reliable evidence of the execution of such instrument. One witness, Hoyt, although a man of some pretensions to respectability as regards his family, station in society, and connections, is proved to have been a talking, babbling man, whose statements of facts are not much to be relied on; and if the fact of the execution of this will depended on his testimony alone, the jury might well consider it insufficient to satisfy their minds as to any doubtful matter. But the material portions of his testimony are completely corroborated by the testimony of four witnesses, whose characters are wholly unimpeached. Their standing, their education, their manners, are of the best in society. They relate facts and circumstances which it was im-

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possible for them to know if not true. They have been put on the stand, face to face with the jury. They have undergone a most stringent and searching cross-examination by most able and ingenious counsel. This forms the best possible criterion to judge of the value of testimony. It is hard even for the most experienced and hardened villain to stand such a test. You have seen their conduct, manners, and countenances. You have heard their answers. Were they such as to give confidence in their candor and truthfulness? Have they contradicted themselves or one another in material facts? They make wrong guesses as to length of time; they may have differed with the house servants as to some immaterial circumstances—whether tea was over, &c., &c. Such discrepancies will always occur in the testimony of the best men, when cross-examined as to a thousand minute collateral circumstances. If such small matters should discredit a witness, we should have little or no reliable testimony in a court of justice.

Each one of these witnesses testifies distinctly, that Meeker did execute this paper, and did, in their presence, publish it as his last will and testament—that he was in the full use of all his faculties; of sound and disposing mind and memory. They relate his conversations at the time, which prove not only the fact of his sanity at the time, but that this paper contains the disposition which he then intended to make of his property, and is the identical paper which they saw executed. These witnesses have either sworn what is true, or they have conspired together to commit the grossest perjury. Any other hypothesis is sheer fancy and imagination, conjured up by the in-

genuity of counsel to avoid the direct accusation of a crime, which the charge of fraud relied upon in their defence, indirectly asserts.

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In order to establish this charge the testimony of defendants must be sufficient to convince your minds by satisfactory evidence. That these four ladies of unimpeachable characters were morally capable of conspiring together to commit perjury in order to sustain a forgery; and that, too, of an instrument which is of no benefit to them, but to enrich a person who was a total stranger to them—this may almost be said to be a moral miracle. But supposing them morally capable of such a conspiracy, you must be convinced also that these ladies were capable of concocting and arranging a false story so perfectly, that the most scrutinizing cross-examination of counsel cannot convict them of their guilt; and of being able to narrate this story with all its circumstances, with all appearance of artless simplicity and truth, and without a blush or tremor—a task which the most practised, astute and abandoned knaves in the community would be incapable of performing. The evidence to establish such a belief must be facts clearly and indisputably proven, which when arrayed together form a chain of circumstances incompatible with any other solution than the falsehood of this testimony.

Opinions with regard to handwriting are the weakest and least reliable of all evidence as against direct proof of the execution of an instrument. Generally, when the jury have acknowledged signatures for comparison, they can judge as well of the character of the disputed signature as if they had seen the party write an hundred or a thousand times. It is but an opinion formed from comparison simply. The witness com-

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compares with his remembered original—the juror has actual original before his eye. Tell a man that a person's name, with which he is acquainted, has been forged, and nine cases out of ten, he will be astute enough to fancy he discovers some marks of it. If it be a good forgery, very few men are able to detect it; and hence other witnesses not prepared beforehand to pronounce it such, will very truly say they would take it to be his signature. But there may possibly be such glaring marks of forgery on the face of an instrument as to condemn it, especially if proved by witnesses of doubtful character, and connected with other suspicious circumstances as to the persons and place where it had its origin, and these marks may be so strong, and circumstances so convincing, that a paper may be pronounced a forgery in the face of the testimony of witnesses whose previous character cannot be otherwise impeached. You have the paper before you and numerous acknowledged signatures of the testator, and you must judge whether there is such evidence of forgery on the face of it, as either of itself, or in connection with clearly established facts, to entirely destroy the credibility of the testimony to its execution. Is there any thing in this will so surprising and so unnatural, and so inconsistent with the known desires and intentions of the testator, as to make it impossible to believe it the work of the testator? Had he ever any *certain*, consistent and continued plan and determination for disposing of his estate from which he *never deviated*? Has he taken more from his heirs in this will than in some others? If his declarations, permitted to be given in evidence in this case, do not prove that, they prove nothing. So, too, one single declaration acknowledging the pro-

visions here made as his will, entirely annuls them, and corroborates the will. If it be true that the testator was continually changing his will; continually talking about it, and boring his friends and acquaintances to write new ones for him; if in the midst of his avarice and stinginess, he was trying to get services and attentions from his friends and relations for nothing, by means of promises, and exciting hopes of being remembered in his will; talking loosely, telling lies; if his declarations of intentions were sometimes consonant with the provisions of one will, and sometimes of another; if you believe that he had the slightest motive to keep people in the dark as to the real contents of his will; if he was trying to curry favor to his other plans in life, or satisfying his vanity by magnificent prospects for charitable purposes, to be executed after his death, while he was too stingy to part with a dollar in his lifetime; if he had one great passion of his life, to wit, the defeating what he and many others very justly considered a high-handed and oppressive seizure of his property for no great public use, but rather for the convenience of the people of Newark, or some of them; if this will conforms to his expressed intentions on that subject of his ruling passion; then all his declarations tending to impeach this will, amount to nothing. They rather strengthen than impugn the paper in question.

It is not the intention of the court to dwell upon, or even notice the thousand and one minor issues with regard to facts, which if unexplained, tend at the farthest only to cast some suspicion upon the conduct of that chattering busybody, Hoyt, the witness who is impeached. Those who charge fraud are bound to prove it by circumstances or evidence which will lead

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our minds to certain and definite conclusions. All the facts must point to one focus, making it bright as day. If the supposed facts are capable of being reconciled with innocence, or if they cross the path of each other, pointing to different hypotheses, and proving and centering on no one conclusion, they cannot be relied on as proving anything.

To give force and application to the suspicious acts alleged by counsel, they have at one time to assume the hypothesis that Hoyt, with little or no acquaintance with Boylan, or without any combination or conspiracy, or even suggestion or promise from him, had volunteered to commit a forgery and to seduce his innocent and respectable wife and daughters to commit perjury in support of it; and this, too, in the hopes that Boylan might perchance reward him for his fraud.

Hoyt has been proved to have been a blattering busybody—not to be trusted in money matters, or in his narrations of fact; but I do not know of any proof, that he was so arrant a fool, or so heartless a villain, as to execute such a piece of gratuitous villany; and it lies upon those who allege it to prove it beyond a doubt by clear and indisputable evidence. Casting a cloud of suspicion on a man, by ingenious insinuations of how he might possibly have been guilty—the noise and confusion of loud and clamorous charges of fraud—will not amount to proof.

Another hypothesis is, that Boylan and Hoyt conspired together and had this forgery executed and perjuries prepared. This supposition differs from the other, in that it alleges some motive for a conspiracy between parties who may have agreed, although there is no evidence of that, to divide the spoil obtained by their mutual villany. But it carries with it also

this evident difficulty, that while Hoyt's unfortunate character was such that you might impute any act of dishonesty to him with some probability of credence, the hypothesis compels the party making it, to furnish clear and distinct evidence that Boylan, a man of fair standing in the honorable profession of the law, has committed a base forgery, and conspired to defraud the heirs of Meeker out of their property. Have you any clear, distinct or reliable evidence to establish the commission?

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The dictum of an ecclesiastical judge which has been read to you, may be law in courts where the clergy execute the laws. But it never can be received in a common law court. You are called upon to decide an issue of fact. The defendants have undertaken to prove this will a forgery; you have to try that issue, and find it true or false. You are not called upon to choose between two wills, and to say which must be admitted to probate. An ecclesiastical court may assume like cadis or sultans to dispose of rights of property on principles of compromise and convenience, without troubling themselves to find out the truth as to a contested instrument. But juries in a common law court exercise no such irresponsible power to dispose of men's property by such compromises to save themselves trouble of investigation. They are sworn to give a true verdict, a verdict according to law—to say the truth on the issue. If the instrument in dispute, which conveys a title to valuable property to the plaintiff, be a true one, the jury are bound to find a verdict for him. If, on the contrary, it has been proved to be a forgery, they must say so, however it may affect the reputation of the parties or pretended and false witnesses. There

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 THE CHARGE. "that jurymen may dine."
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I come now to the SECOND POINT: Was the testator at the time of executing this will of sound and disposing mind and memory? This point, of course, is not necessary for you to consider if you believe the will to have been a forgery.

The general rule of law on this subject is as follows: "Every man is presumed to possess a sound mind till the contrary be shown; and it is incumbent on the party alleging insanity to establish the fact. If general insanity be proved, it is presumed to continue till a recovery be shown; and the party alleging a restoration must prove his allegation. Insanity at the time of making an alleged will must be proved in order to render the instrument void."* The same rule is stated in the remarks of the late Justice Washington, in *Stevens v. Vandervere*,† in our own court. He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease. He may not be able, at all times, to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had been before asked and answered; and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject

* *Grabill v. Barr*, 5 Pennsylvania State, 441.

† 4 Washington's Circuit Court, 267.

which he may possibly have often thought of; and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. More especially, in such a reduced state of mind and memory, he may be able to recollect and to understand the disposition of his property which he had made by a former will, when the same is distinctly read over to him. The question is not so much what was the degree of memory possessed by the testator, as this—Had he a *disposing* memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it, and the objects of his bounty. To sum up the whole in the most simple and intelligent form: Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged, at the time when he executed his will?

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Now although we have the opinion of certain witnesses that Meeker was a monomaniac on a certain subject, yet when it comes to be explained, it furnishes no evidence that he was insane, nor does it contradict in the least the idea that he enjoyed the use of his faculties, and was of sufficient understanding to manage his concerns and transact his business with his usual shrewdness to the day of his death. Witnesses often use phrases with very indistinct notion of their meaning, and give opinions without any facts to justify them. It is in evidence that the testator was of strong mind, but very eccentric, obstinate and opinionated; but no witness has shown facts from which a loss of a sound and disposing mind and memory could be inferred. His mind was greatly excited on a particular subject—his park property—he was very stingy and set a high value on his rights of

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property. But it is no evidence of any mental delusion that he thought this seizure of his property without his consent, a high-handed exercise of power—an outrage on his rights—unconstitutional—worse tyranny than the tax on tea which caused the revolution. That it became his hobby; made him very troublesome, and a bore to all his acquaintances and friends, is of no importance at all, in the matter trying before you, if he retained his memory and his usual shrewdness in the management of all his other concerns. Many a man has some hobby, and may ride it very much to the annoyance of others, and yet be perfectly capable of managing his own affairs, and disposing of his property by deed or will. He may believe in spiritualism, the book of Mormon, Fourierism, or any other of the absurdities of the day which infest the brains of fanatics. He may talk very much like a fool, as you or I may think, on these subjects, and unduly magnify their importance. He may profess an absurd fondness for music, and play the Pandean pipes, behave like a fool occasionally; may tell his dreams and call them visions, and may believe in them; he may be addicted to telling lies about his will; yet, gentlemen, we could not on these accounts pronounce him unfit to manage his affairs, or dispose of his property in his lifetime; and could not avoid his deeds, nor condemn him to a lunatic hospital, as a fit tenant for such an institution. So all that is proved makes it no reason for regarding him as not of disposing mind and memory, and to set aside his will. He appears to have been shrewd enough not to lend his money or sell his property on doubtful security, notwithstanding the arts of Hoyt to prevail upon him to do so.

There are cases indeed where an improper influence is brought to bear on the mind of one whose mental capacity is naturally weak, or where the mind is impaired by age, intemperance or disease, but where testamentary acts which might otherwise perhaps be good, will be set aside. The persons in such a case have been imposed on ; they have no will, and the instrument to which their signatures have been obtained, may be said not to contain their will, but that of those who procured it to be executed.

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But I am bound to say to you, that there is no evidence in this case which would justify a verdict against this will on that account.

VERDICT IN FAVOR OF THE WILL.

BATTEN v. SILLIMAN.

[PATENT : INJUNCTION.]

Where an alleged infringement of a patented invention, consists in the use of some improvement in expensive machinery, which has been adopted in good faith by a defendant, and where the profit of the patentee consists not in the monopoly of selling his machine, but in the price of licenses given to others to use it; it being the interest of the patentee that all persons should use his improvement, provided they pay him his fee for a license; and the injury being, not in their using his invention, but in their not paying him for using it—this court, sitting in chancery—though it does not in such capacity necessarily act as auxiliary to a court of law, but may render a final decree on a patent—will not, before a right is established at law, grant a preliminary injunction except in a clear case; since it might ruin the defendant, without doing any corresponding benefit to the patentee; and since the main objects of an injunction can be obtained by making the defendant keep an account until the right is decided at law.

The court distinguishes such a case as that just mentioned from the case of a medicine, for example, where the patentee's profit consists in a *monopoly* of sale, and the defendant has been at little or no expense, while his competition might be highly injurious to the complainant; and would refuse an injunction in the former case, when it might, perhaps, grant it in the latter.

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THIS was an injunction bill filed by Batten, claiming to be the inventor of a machine—certain rollers for breaking and screening coal—against the defendant, Silliman, who, it was admitted, was using a machine similar in several respects to the one of which the complainant alleged himself to be the inventor. Most or all of the ordinary formal allegations (though not those usual in such bills, that the plaintiff had enjoyment and possession, and in consequence thereof had made sale of licenses or rights) were made in the bill; and it was further alleged that the validity of the patent had been tried at law, in this court, in three cases (one of them being *Batten v. Taggart*, reported

in its conclusion, on a point of law, *supra*, vol. 2, p. 101), in which after ample preparation and numerous notices, no witness was produced or could be produced to impeach or disprove the originality of the invention; and that although these verdicts were afterwards set aside by the court, upon a technical question in no way affecting the originality of the invention, this decision was finally reversed in the Supreme Court of the United States, on error, and the patent sustained.*

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* See Batten
v. Taggart, 17
Howard, p. 74.

Numerous *ex parte* affidavits were filed in behalf of the complainant, stating that the defendant had put into operation, and was still using, a machine constructed on the same plan and substantially like the machine described in the patent and bill of the complainant, of which patent, as these several deponents verily believed, the machine used by the defendant was an infringement.

The defendant, on the other hand, swore in his answer that he had a good defence both as to matter of law and matter of fact; that he was advised that the complainant never had such possession and enjoyment of the alleged invention as is required in applications of the sort now made by him; that he had never made sale of licenses, rights or interests in consequence thereof—a matter which, on an injunction bill, he ought, if he had so made sale, to aver,—but that on the contrary, machines substantially like the one described in his patent had been extensively and were still so used, and the complainant's right in almost all cases resisted or denied. The answer then went into a history of the suits alleged by the complainant to have been brought by him under his patent, and set forth some blunders and carelessness in his specifications at the patent office, and delays

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consequent thereon, and showed also that a much greater delay than was either indispensable or necessary had taken place on his part in urging trials at law of his rights; that in regard to these suits motions had been made by the defendant for continuances on the ground of evidence, the discovery of which was obtained at too late a period to be included in the notice of defence; but that these motions were unsuccessful, and that the causes were therefore submitted to the jury solely upon the question of damages; all evidence as to the want of novelty being excluded; and that the verdicts given for the plaintiff were given independently of any evidence on the point last mentioned; that moreover these verdicts were afterwards set aside and new trials granted in each case upon views of law applicable to the whole merits, and not, as the bill alleged, upon a mere technicality; that while, as the complainant alleged, it was true that on writs of error being taken by him, the decision of this court was reversed, yet, that the cases were remanded by the court above with directions *to award a venire facias de novo*; that no farther proceedings had been taken by the complainant in those actions at law; that notwithstanding the verdicts given, as mentioned by the complainant, in his favor, no judgments had ever been entered on them, and that therefore the complainant had failed to obtain a verdict and judgment, and that his right had in nowise been established by any legal proceedings, but on the contrary, was still unsettled and in dispute, and that the actions at law were still pending, and the defendants preparing to make defence in them.

The answer alleged further that machines quite similar to that claimed by the complainant as his, had

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been extensively used for breaking coal before and since he obtained his patent; and that notwithstanding the granting of the patent, many such machines had been run and used by the workers of mines in consequence of the opinion generally entertained that the complainant, Batten, had no valid rights under such patent, also by reason of his apparent indifference in prosecuting such claims, together with his failure successfully to establish them in the suits in this court; and that the defendant believed and expected on a trial at law to prove an entire want of originality in the invention. The answer further stated that the defendant had not himself erected the machine now sought to be enjoined, but had bought it at Marshall's sale on an execution from this court, about five years ago, and had never any notice to desist from its use; and concluded with the allegations that he was competent to satisfy any damages which might be recovered against him by the complainant at law; that the breaking apparatus, its fixtures, &c., had cost him several thousand dollars; that he employs over one hundred operatives at his works, and that an injunction as prayed for, would produce great and irreparable damage to him.

The defendant on his side also, brought *ex parte* affidavits, to prove a want of originality in the complainant.

About two hundred machines which the complainant alleged were infringements of his patent, were in use in different places, in violation of his alleged rights. The patented machine formed but a small, though an important part of the combined machinery used for breaking coal; steam enginery and other apparatus, the cost of which is several thousand dollars,

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being requisite. The complainant did not desire an exclusive use of his machine; but desired to prevent the use of machines like it, except under his license; he being willing to let similar machines be used by others, they paying him one per cent. per ton of coal broken and screened upon them.

After argument by Messrs. *Porter* and *W. H. Rawle* for the complainant, and by Mr. *Cadwalader* on the other side, the opinion was given by

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GRIER, J. The remedy by injunction in patent cases is given by courts of equity, on account of the insufficiency of that given by a court of law. It is in its nature preventive, where irreparable mischiefs are apprehended, or when the patentee is likely to be vexed by litigation and a multiplicity of suits against stubborn pirates of his invention. The Circuit Courts of the United States have original jurisdiction as courts of chancery in all patent cases. They do not act merely as auxiliary to courts of law, and may therefore render a final decree on a patent whose validity is contested, without sending the parties in law to try their rights. It is no reflection on juries or trial by jury to say that many disputes about the originality and infringement of patents depending upon complex mathematical calculations, upon a knowledge of the principles of chemical science, and of mechanical philosophy, cannot be satisfactorily decided by the verdict of twelve men, a majority, if not all of whom, have no knowledge or experience on the subjects they are called to decide on.

But while courts of equity will in some cases decide such questions on final hearing, without the assistance

of courts of law, it does not follow that in every motion for preliminary injunction, the court will try and determine the whole case on *ex parte* affidavits, on five days' notice, like a court of "*pied poudre*."

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In cases of waste, purpresture and nuisance, where the mischief done by their continuance till final hearing, may be irreparable; or where the injury or loss to the defendant by this interposition may not be of importance, or the delay in exercising his rights could be easily compensated; such preliminary interference may be necessary to the ends of justice, even where the equity of the bill is denied by the defendant. In the case of infringement of patents, such can seldom be the case, and such preliminary intervention can only be invoked in case of wanton and stubborn persistence in pirating an invention, the title to which has been clearly established either by trial at law, or by long and peaceable possession. Hence we have refused to grant a preliminary injunction where the defendant denies on oath either the originality of the invention or the infringement of the patent, leaving the decision of the question till final hearing. It must be a very strong case indeed, either of impending mischief to the complainant, or where the court, by having the machines or models before them, can see clearly that the defence set up is a mistake or a mere pretence, that the court will thus summarily interfere by granting execution before final judgment, where the defendant alleges under oath a valid defence, and denies the equity of the plaintiff.

There are cases, also, in which this preliminary injunction would cause irreparable injury to the defendant, with no corresponding benefit to the patentee.

Where the profits from a patented invention arise

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from a monopoly of the sale of the machine, medicine, or composition invented, and the competition of the defendant may be highly injurious to the established legal rights of the patentee, it may be a very proper exercise of the discretion of the chancellor to restrain the defendant from infringing till he has established his right, if he pretends to have any. But the case is very different where the supposed infringement consists in the use of some improvement in expensive machinery, which has been adopted in good faith by a defendant, and where the profit of the patentee consists, not in the monopoly of selling his machine, but in the price of licenses given to others to use it. In such a case it is the interest of the patentee that all persons should use his improvement, provided they pay him his fee for a license. The injury to him is not in using his invention, but in not paying for such use. It would be an abuse of the discretion of the court to stop a mill or furnace because it may have used some patented improvement in its machinery. It may ruin the defendant without any corresponding benefit whatever to the patentee. The only injury to him is the non-payment of his license, which will be remedied by the final decree of the court, if the defendant shall be found a wrongdoer. The patent in this case is for certain rollers used in the machinery for breaking and screening anthracite coal; they form but a small, though important part of the combined machinery for the purpose. The steam engine and other apparatus necessary to the operation cost many thousands of dollars. The patentee has a fixed price for the use of his invention, one cent per ton. As between these parties alone, it is the interest of the complainant that the respondent should continue to use

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his invention, provided he pays the cent per ton. An injunction, by stopping the business of the defendant, may be ruinous to him. The only use to complainant would be an unjust one. It would deliver the defendant over to him with a rope around his neck, and compel him to accept any terms dictated by the patentee. The defendant has sworn to his belief that he has a good and sufficient defence. Witnesses have sworn that the patentee is not the original and first inventor of the machine. The defendant has a right to a hearing before he is condemned as a pirate or infringer of the complainant's rights. Yet the granting of this injunction would compel him to accept the complainant's terms, and buy his peace without a hearing. And not only so, but it is alleged, and not denied, that some two hundred others would be compelled to do the same.

"It seems to me," says Lord Cottenham, in *Neilson v. Thompson*, "that stopping the works by injunction, under these circumstances, is just inverting the purpose for which an injunction is used. An injunction is used for preventing mischief; this would be using the injunction for the purpose of creating a mischief—because the plaintiff cannot possibly be injured. All that he asks, all that he demands, all that he ever expects, is one shilling per ton (and in this case, a cent per ton). The injunction would be extremely prejudicial to the defendants, and do no possible good to the plaintiff, for the purpose for which it may be used. It may, by operating as a pressure upon the defendant, produce a benefit. But that is not the object of the writ. The object of the court is to preserve to each party the benefit he is entitled to, until the question of right is tried, and that may

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entirely be secured by the defendants undertaking to keep an account. If the plaintiff is entitled, the court will have an opportunity of putting him precisely in the position he would have stood in if this question had not arisen."

But it is contended that the court are bound to give the plaintiff the benefit of this interlocutory injunction, whatever use he may be disposed to make of it, because there has been a verdict of a jury establishing the validity of this patent, and a peaceable possession of the rights conferred by it.

Admitting the court would be justified for these reasons, to grant this motion, without any exercise of discretion founded on the reasons we have given, we do not think that these assertions are supported by the evidence. It is true there has been a verdict on a former trial between other parties. But that verdict was set aside by the court as contrary to law, and it moreover appears that the defence now offered to the validity of the patent, was not before the jury, nor passed upon by them. They were instructed by the court to assess the damages, without reference to any other question. In a subsequent trial, the same court decided against the validity of the patent, on questions of law, which were afterwards reversed by the Supreme Court. But in none of these trials did either the court or jury pass upon the defence, as to the originality of the plaintiff's invention, on the facts now submitted. The verdicts in the cases can therefore have neither a technical nor moral effect in the decision of the present motion.

Neither can the evidence of long possession benefit the plaintiff; for it has not existed. On the contrary, after the decision of the Circuit Court against the

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validity of the plaintiff's patent, those who had previously agreed to pay the plaintiff for the use of his invention, have ceased to do so, and many others, acting in good faith, have used the invention in their coal breaking machines, in hostility and adverse to the plaintiff's claims. It has been admitted on the argument, that some two hundred machines are in use by persons who resist the claim of the patentee.

In every view I can take of the case, I think the granting of this motion would be an injudicious use of the discretion of the court, and wrong to the defendants, who, for anything that appears, may believe that they have an honest defence to this action, and are, therefore, entitled to full and final hearing before they are condemned.

If this motion were granted, they would be compelled to submit without a trial of their rights, which would be contrary to the first principles of practice, and an act of sheer tyranny in the court. Without intimating any opinion as to the validity of this patent, or the truth of the defence, the court must refuse this motion, with costs, and order an issue between the parties as to the validity of this patent, to be tried before a jury on the first Monday of April next.

INJUNCTION REFUSED, but defendant ordered to keep an account.

[EQUITY DOCKET, NOS. 2, 3, AND 4, OCTOBER SESSIONS, 1855.]

EWING v. BLIGHT.

[EQUITY PRACTICE: DILATORY PLEA.]

It is not requisite in equity suits in the Third Circuit, that a dilatory plea be filed within four days after the term to which the bill is filed. On the contrary, such a plea may be entered at any time before or on the next rule day succeeding that of the defendant's appearance; there being no distinction in this respect between dilatory pleas and any other pleas. The case is different at law.

Where in such suit a plea is filed, though filed irregularly, the complainant cannot treat it as a nullity and take a decree as *pro confesso*. Before taking such a decree in such a case, he should first obtain an order to set the plea aside, or to take it off the files as irregular.

Domicile or citizenship, depending not only on the acts but also on the intentions of the party of whom it is averred, and so being often the predicate of nice legal distinctions, as well as of facts and intentions of which another may be cognizant, need not, in a dilatory plea, be sworn to as of knowledge, nor otherwise than as of belief.

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IN this suit—a bill in equity against a citizen of Pennsylvania—the complainant averred himself to be a citizen of another State; an averment necessary to give the court jurisdiction. A plea was filed denying that the complainant was a citizen of another State; and this plea was put in twenty-five days after the bill was filed. The settled practice of this court *at law* requires that all dilatory pleas should be filed within four days after the term to which the declaration is filed, counting both days inclusively; but the rules of this court at equity would seem to have no provision as to this class of pleas, further than as one of them, the 18th, declares generally, that the defendant may enter his plea, demurrer or answer at any time before or on the next rule day succeeding that

of his appearance; in default of which the bill may be taken *pro confesso*. OCT. SESSIONS,
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Mr. C. Ingersoll, for Ewing, the complainant, had entered an order in the clerk's office, that the bill be taken *pro confesso*; the ground of his entry being that the plea was not filed within four days. This entry, counsel on the other side, now moved to rescind.

GRIER, J. The rules in courts of law, with regard to dilatory pleas, are very stringent, and require them to be put in within four days after the term to which the declaration is filed, counting both days inclusive. They require also that the affidavit to the truth of the plea be positive, and not according to the belief of the deponent. In the practice of those courts, also a dilatory plea, not filed in time or subsequently authenticated, may be treated as a nullity, and the party making it defaulted for want of a plea. THE COURT.

But such is not the course of practice in courts of equity. By the rules of this court, the defendant may enter his plea, demurrer or answer to the bill at any time before or on the next rule day succeeding that of his appearance. There is no distinction made between pleas to the jurisdiction, or that called dilatory pleas and any other pleadings. Nor can the complainant treat the plea filed as a nullity and enter an order taking the bill *pro confesso*, where the plea is not sufficiently verified. The proper mode of taking advantage of a formal defect of this description, is by an application for an order setting aside the pleading, or to take it off the files for irregularity.*

ENTRY IN CLERK'S OFFICE RESCINDED.

* Wall v. Stubbs, 2 Vesey & Beames, 385; Heart v. Corn- ing, 3 Paige, 570.

Upon the court's announcement of this order, re- STATEMENT.

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scinding the entry made by his direction in the clerk's office, of judgment *pro confesso*, Mr. *Ingersoll* now moved for an order that the *plea should be set aside*, because not sworn to, and therefore not sufficiently verified. Counsel on the other side having been heard against the motion, the court's opinion was given by

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GRIER, J. It has been said, by Lord Redesdale, "that pleas to the jurisdiction of the court, or in disability of the person of the plaintiff, as well as pleas in bar of any matter of record, may be put in without oath."

But this is true only where the truth of the plea appears by some record. For it is now well settled that wherever the plea puts in issue matter *in pais*, or which may be established on the hearing, by the testimony of witnesses, it should be verified by oath.

The principle upon which the court acts in requiring pleas to be put in upon oath, is, that it will not permit a defendant to delay or evade the discovery sought, unless he will first pledge his oath to the truth (or at least to his belief of the truth) of the facts upon which he relies in all cases where the facts are those of which the court does not take official notice.

Where the facts averred in the plea, are of the defendant's own knowledge, or acts done by himself, they must be sworn to positively. If they are acts done by others not necessarily within his knowledge, they need not be sworn to positively. It is sufficient if he swears to his belief of their truth, and this more especially where the plea is negative, and denies some fact alleged affirmatively in the bill. As where the bill alleges that the complainant is heir, executor, or

partner.* There is no distinction in equity between pleas to the jurisdiction or other pleas.

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The bill in this case avers that the complainant is a citizen of New Jersey, and of course *not* a citizen of Pennsylvania. This averment is necessary to give the court jurisdiction. The plea denies the fact as averred, and affirms the negative inference assumed from it. Although in strictness it may be said to deny the allegation of the bill by affirming a positive fact, inconsistent with such averment, it may nevertheless be considered a negative plea taking issue on an averment of the bill necessarily within the personal knowledge of defendant. Domicile or citizenship depends not only on the acts, but the secret or declared intentions of the party of whom it is averred. It is the predicate often of very nice legal distinctions, as well as facts and intentions of which another may not be cognizant. It is generally an opinion of belief founded partly on facts known, and partly on information from others. In many cases one man may have such a thorough knowledge of the birthplace and residence of another and the acts of his whole life, that he may conscientiously swear to his citizenship or domicile absolutely and positively. But in many cases a defendant cannot have such knowledge, and can only swear to his belief.

* Drew v.
Drew, 2 Vesey
& Beames,
169; Heart v.
Corning 8
Paige, 570.

Where an answer sets forth a detail of numerous facts, some on the knowledge of the defendant and others on information, the oath usually makes such distinction. But a plea denying the citizenship of the complainant, being to a single fact, never sets forth the particular facts or reasons which enter into the result. Hence the form of the oath to an answer

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is not usually found attached to a plea denying a single fact.

If the fact denied be not within the personal knowledge of the deponent, he can but swear to his belief, and the rules of pleading in chancery require no more. It is not necessary to set forth the reasons of such belief, or to distinguish between, how much of it is founded on information, how much on personal knowledge, and how much on legal investigation or instruction of counsel. Few persons are capable of such an analysis of their own faith. The law should not compel a party to swear rashly, under penalty of losing his rights.

The motion to strike out the plea for want of a sufficient verification is therefore refused.

[EQUITY DOCKET, NO. 11, APRIL SESSIONS, 1855.]

EWING v. BLIGHT.

[EQUITY PRACTICE: INJUNCTION DURING PLEA TO JURISDICTION.]

Chancery will not grant an injunction, nor appoint a receiver pending a plea to its jurisdiction; but to guard against the abuse of dilatory pleas, or any irreparable mischief, the court will order an immediate hearing or trial of the plea.

IN this case a plea to the jurisdiction had been filed, denying that the plaintiff was a citizen of New Jersey, which he claimed to be in his bill; and before this plea was disposed of, or any further step taken, a motion was made by Mr. *C. Ingersoll* for an injunction and receiver. The point of the case was whether, in these circumstances, the court would entertain such a motion.

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GRIER, J. The pendency of a plea to the jurisdiction of the court, necessarily precludes all further action of the court, till it is decided. This rule of practice is founded on reason, as well as fortified by authority.*

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OPINION.

* 13 Vesey,
164.

While the jurisdiction of the court or the equity of the bill is in doubt by the pendency of a plea or demurrer, it would be highly improper for the court to interfere by the exercise of such high powers over men's property.

The court have it always in their power to guard against the abuse of dilatory pleas. If any irreparable mischief should impend, which it is absolutely

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necessary to meet with promptness, or if there be any just suspicion that the plea or demurrer is merely intended for delay, the court will order an immediate hearing or trial of the plea.

If an issue be desired to try the plea of jurisdiction in this case, it will be ordered; or any other rule which complainant may desire, for the purpose of expediting the final hearing, in case the jurisdiction should be found to exist.

[EQUITY DOCKET, NO. 11, OCTOBER SESSIONS, 1855.]

HEATH v. WRIGHT.

[INJUNCTION: PATENT MEDICINE.]

Chancery will not interfere by injunction in questions of trade mark between the vendors of patent medicines, being quack medicines; such questions having too little merit to commend them on either side.

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THIS was an application by the complainant for an injunction to restrain the defendant from using the name "Kathairon" for a compound for toilet purposes, manufactured and vended by both parties. The complainant alleged that this term was his trade mark, which the defendant denied, alleging that the word "Kathairon" was in common use, like that of Magazine, &c. Both Kathairons consisted essentially of a mixture of castor oil and brandy; and it appeared by the labels upon the bottles which contained the respective "Kathairons," that the complainant claimed for his, that it would infallibly cure "scald head, tetter, ringworm, erysipelas, itch, barber's itch, shaving pimples, salt rheum, chapped hands, stings, cuts, chilblains, swellings, inflammations, rheumatisms," &c.: and that it would "almost instantly relieve sympathetic attacks of nervous headache," besides "restoring the hair, and preventing it from turning gray." "It would be labor lost," his label declared, "to enumerate the wonderful properties of this invaluable preparation; its reputation, co-extensive with the civilization of the globe, makes all praise superfluous, all exaggeration impossible."

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The claim of the defendant was not quite so extensive. He declared his to be a "sovereign remedy for tetter, itch, scald head, salt rheum, ringworm." He made no mention of its power to cure erysipelas, but professed that it was able to cure "barber's itch, chapped hands, chilblains, stings and bites of insects, inflammations, swellings," &c., besides "preserving the hair and keeping it from turning gray," and dispelling nervous headache. And he averred that *his* Kathairon had had "millions of patrons."

THE COURT.
KANE, J.

KANE, J. It is impossible for me to distinguish this case in principle from that of *Fowle v. Spear*, which was before me on a similar motion some years ago. I then refused an injunction against the vendor of a patent medicine at the suit of his brother quack, who complained that his label and envelope of certificates had been imitated, on the ground that the special action of chancery could not be involved in a controversy which had so little merit to commend it on either side.

INJUNCTION REFUSED.

UNITED STATES v. DARNAUD.

[SLAVE TRADE: ELECTION OF FELONIES: OWNERSHIP OF VESSEL:
CITIZENSHIP: DISCHARGE OF SWORN JUROR: PRIVILEGE OF
WITNESS: CUSTOM HOUSE REGISTRY: COMPARISON OF HAND-
WRITING.]

In a prosecution under the act of May 15th, 1820, for suppressing the slave trade, the act of receiving negroes on the coast of Africa, and of confining and detaining them on ship-board, and the aiding and abetting in confining, form one transaction, and may therefore be joined together in the indictment and prosecution, under different counts; but the selling and delivery of the negroes at the termination of the voyage, as on the coast of Cuba, seems to be a distinct transaction; and if this felony is charged in the same indictment with the other, the prosecution will be made to elect on what counts it will proceed.

Ownership of the vessel by a citizen of the United States, if the accused be not, himself, a citizen; or citizenship of the accused, if the ownership be not by such citizen, is an essential ingredient in maintaining a prosecution under the 4th and 5th sections of the act above named.

Citizenship, within the meaning of this act, is not what may be called citizenship of domicile, nor it is such citizenship as has been claimed by diplomatic assertion under our naturalization laws, for one who has formally declared his *intention* to become a citizen, without having proceeded further. But it is that citizenship which has a plain, simple, every-day meaning; that unequivocal relation between every American and his country which binds him to allegiance and pledges to him protection.

The custom house registry of a vessel, under the acts of Congress, as a vessel of the United States, prior to which registry an oath must be taken by the person in whose favor it is made, that he is true and only owner, and a citizen of the United States, is evidence of her national character within the meaning of the acts of Congress; and of the character under which she publicly appeared and acted; but in a criminal prosecution against a third person, it is very slight evidence indeed—if it be evidence at all—of the real fact of ownership, and whether or not the ownership be in a citizen of the United States. (The case of *United States v. Bruno*, 2 Wallace, Jr., 264, very slightly qualified, perhaps, but substantially confirmed and its correctness enforced.) In such a prosecution the ownership must be proved distinctly, and as other facts are proved, by common law testimony. Purchasing the vessel, paying for her, repairing her and fitting her for sea, bargaining and paying for her ship stores, procuring her pilot, and shipping her crew, all these are proper evidence of ownership, as they also are,

if ownership is disproved, that the vessel was navigated for or on behalf of the person doing these acts. But if in direct connection with these acts and along side of them, it is proved as a fact that the funds which this person was using belonged to a third party, not a citizen; that he had no funds of his own, that he spoke of himself as an agent and was recognized as such by the banker who put him in funds, and by the third person whose funds they were—all this, which is proper evidence—is evidence to show that the ownership was not in a citizen but in a foreigner; and so far to defeat the prosecution.

It is irregular for the court to instruct the witnesses generally, or even a single witness generally, that they were not bound, in answer to questions which might be put to them, to make any answers which would criminate themselves. The proper way is to wait until a question is asked, which, if answered in one way may criminate the witness, and for the court *then* to interfere.

Whether two or more signatures, which purport to be the signatures of *different* persons, are or are not written by the *same* person, is a proper subject of proof by an expert; though the testimony of an expert on such a subject is a dangerous kind of evidence.

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* Act of May
15th, 1820;
ch. 113;
§§ 4 and 5.

A LAW of Congress* designed for the suppression of the slave trade, enacts by one section, "that if *any citizen of the United States*, being of the crew or ship's company of any *foreign* vessel, engaged in the slave trade, or *any other person whatever*, being of the crew or ship's company of any vessel, *owned in whole or in part, or navigated for, or in behalf of any citizen or citizens of the United States*, shall land from any such vessel, and *on any foreign shore, seize any negro or mulatto*, with intent to make such negro or mulatto a slave, or shall receive such negro or mulatto on board any such vessel with intent as aforesaid, such citizen or person shall be adjudged a pirate; and suffer death." And by another, enacts that if any such person shall forcibly *confine or detain, or aid and abet in forcibly confining or detaining on board such vessel*, any negro or mulatto, with intent to make such negro or mulatto a slave, or shall *land, or deliver on shore, from on board any such vessel*, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro

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or mulatto as a slave, such citizen or person shall be adjudged a pirate; and suffer death." Under this law, Darnaud, the prisoner, who had been engaged in a slaving voyage on the Grey Eagle, was indicted. The indictment contained thirty-nine counts. The defendant's citizenship and the national character of the vessel were properly alleged. And five distinct charges were made in the bill. 1st, receiving negroes on board the vessel on the coast of Africa; 2d, confining and detaining on board the vessel; 3d, aiding and abetting in confining and detaining on board the vessel; 4th, delivering on shore at Cuba from on board the vessel, having previously sold; 5th, delivering on shore there from on board the vessel, with the intention of selling.(A) One Marsden, of New York,

[A] Slave vessels sail with two or three, or four captains. One captain clears her in a U. S. port, and swears he is an American citizen. Another, belonging to a different country, in connection with the first, when she arrives at the coast of Africa receives the slaves on board. Another, after the slaves are received, takes charge of them and commands the vessel, and makes one of the former captains the doctor, mate, steward, or something else. Another delivers the slaves on shore. This is done in order to enable the vessels to seek the protection of a flag which the cruiser hailing them will, under the treaties between different governments, respect and regard. If a vessel of this nature happens to be chased by a British cruiser, the practice is to run up the American flag; the American captain shows himself with his American papers, and the cruiser goes off without boarding. When an American cruiser comes in sight, the Portuguese or Spanish flag is run up, and the false Portuguese or Spanish papers are produced. In the present instance, when a British cruiser hove in sight, the American flag was run aloft and the American papers were ready to be shown, and when that flag was seen the cruiser went off. It was on these accounts that the indictment charged the prisoner in this separated way. 1st, with receiving; 2d. with confining and detaining on board, &c. The counts were essentially as follows:

Eleven counts, from 1st to 11th, inclusive, charged the defendant with *receiving on the coast of Africa on board a vessel called the Grey Eagle, negroes not held to service or labor, with intent to make slaves of them.* The counts were drawn in various forms.

Twelve counts, from 12th to 23d, inclusive, with *confining and detaining negroes on board the vessel Grey Eagle, etc., in various forms.*

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a principal character in the case, and about whose American citizenship there was no doubt, was alleged in the indictment to be the person who owned the vessel when she was thus engaged, or if not the owner, then the person on whose account and for whose benefit she was navigated.

For the
Prisoner.

The prisoner having pleaded not guilty, and Mr. *Vandyke*, the district attorney, having opened his case, Messrs. *Guillou* and *Kane*, counsel of the prisoner, referring to several authorities,(A) moved that

Two, from 24th to 26th, inclusive, with "*aiding and abetting*" in confining and detaining in various forms.

Six, from 27th to 32d, inclusive, with *delivering* on shore from on board vessel, with the following variations:

27th. Charged vessel as *owned, wholly and in part*, by a citizen and citizens unknown, and also charges the intent of defendant to sell said negroes as slaves.

28th. Charged vessel as *owned* by a citizen, with intent to sell.

29th. Charged defendant as *master* of vessel *owned* by a citizen unknown, intent being to sell.

30th. Charged defendant, as one of ship's company, with *delivering at the Island of Cuba, negroes from vessel owned wholly and in part by a citizen and citizens*, having previously sold such negroes as slaves.

31st. Charged vessel as *navigated for a citizen and citizens*, and that negroes had previously been sold.

32d. Charged vessel owned wholly and in part by a citizen and citizens unknown, did on high seas deliver, &c., having previously sold.

33d. Charged that defendant *was a citizen*, one of *ship's company, of a foreign vessel* and *did receive on board* five hundred negroes, said negroes having been seized on a foreign shore, with intent to make slaves of said negroes.

34th. That defendant on high seas, being master of vessel owned, in whole and in part, by citizen and citizens, did receive on board, a number of negroes, who had been seized on a foreign shore.

35th. That defendant was a citizen, and one of ship's company, of foreign vessel and did confine and detain a number of negroes, with intent to make them slaves.

(A) 1 Chitty's Criminal Law, 253; Wharton's Criminal Law, 150; *Commonwealth v. Hope*, 23 Pickering 1; *Young et al. v. The King*, 3 Term Rep. 78; *Weinzarplin v. The State*, 7 Blackford, 186; *Wright v. The State*, 4 Humphreys, 195; *The People v. Baker*, Hill, 159; *Harman v. The Commonwealth*, 12 Sergeant & Rawle, 71; *Commonwealth v. Gillespie*, 7 Sergeant & Rawle, 476; *The State v. Nelson*, 29 Maine Report, 329.

the prosecution should be made to elect on which of the counts it would proceed; arguing that now was the proper time for this application, which if not allowed here could not be allowed hereafter in the shape of error, or in arrest of judgment. They contended that the indictment contained at least four distinct felonies: 1st, receiving the negroes on board the vessel; 2d, confining and detaining them on board; 3d, aiding and abetting in confining and detaining; 4th, delivering on shore from on board the vessel. They were not part of the same transaction, nor were they distinct misdemeanors, merely part of one felony. Each was a distinct felony, alike punishable with death, nor was one an ingredient of the others.

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Mr. *Vandyke*. The application is out of time. If the indictment charged distinct felonies, a motion should have been made to quash before plea pleaded. Having pleaded, the defendant should wait till the prosecution has closed its case. A joinder is allowed even by the common law in regard to all parts of the same transaction. But if it were otherwise, the act of Congress of February 26th, 1863, provides that "whenever there are or shall be several charges against any person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in several counts; and if two or more indictments shall be found in such cases, the court may order them consolidated." The words "which may be

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properly joined" do not refer to all the clauses that precede them, but only to the clause "two or more transactions of the same class." This is a statutory felony; and all the acts charged, even if each one is a felony, are parts of the same transaction, or acts or transactions connected together, and are properly joined.

THE COURT.

GRIER, J. The transaction on the coast of Africa is one matter which may be charged in all the forms it will bear. The receiving of the negroes there, the confining and detaining of them, and the aiding and abetting in confining and detaining, form one transaction, though they are different offences. They may therefore be joined together. It might also in the same connection be charged that the act was done by a foreign citizen in an American vessel, or an American in a foreign vessel. Besides, the vessel might be charged as belonging to A. or B., or persons unknown. These are all parts of the transaction. The indictment, however, goes further, and charges the selling and delivering of negroes on the coast of Cuba, which forms a separate and distinct transaction. I am unwilling to say that the receiving, detaining, aiding and abetting in these acts, the man being an American, or being not an American; the vessel being an American vessel, or being not an American vessel, belonging to A., B., or C., or to people unknown, may not be allegations of the same transaction. But I think, as at present advised, that the selling and delivering of slaves on the Cuban coast is a distinct transaction. If the defence asks me to say more than this, I am not at present disposed to do so. But whatever may be the election of the prosecuting officer, he has a

right to bring out the whole history of the matter as part of the *res gestæ*.

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Mr. *Vandyke*, under this expression of opinion, then elected to try on those counts which charged with receiving on board and confining and detaining, and aiding and abetting in confining and detaining, striking out all which charged with crime on the coast of Cuba.

The Grey Eagle was an American built vessel; and had been owned by seven or eight American merchants engaged as partners in the pearl fishery. One Hollingsworth, of Philadelphia, a reputable merchant, was managing owner, and to him alone, as such, the vessel had been transferred by bill of sale, he taking an oath at the custom house that he was "true and only owner;" an oath required by law to be taken by a person when he *is* true and only owner; but not the proper oath where others are in any way interested with him. The pearl fishery proving unsuccessful, Hollingsworth gave orders to a house in New York to sell the vessel. Marsden called on them and inquired as to the terms of sale. The price fixed was \$10,000. Marsden did not wish to give that amount for her, and he was told that he might go to Philadelphia and deal with the owners. He came to Philadelphia, saw Mr. Hollingsworth, and concluded a purchase of the vessel for \$9,100, and took her to New York. The bill of sale from Hollingsworth to Marsden was dated March 4th, 1854. Marsden of course with that bill of sale took the register, which had been issued at the port of Philadelphia to Mr. Hollingsworth. A pilot took her to New York and delivered her to Marsden.

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Previous to the arrival of the vessel at New York, Marsden employed a rigger to rig out the vessel. She arrived there, of course, some time after the 4th; the register and bill of sale were not deposited in the New York custom house until the 20th of March, but in the meantime the vessel arrived there, and Marsden, with two or three others, commenced the active preparation of the vessel for a voyage. Marsden employed the rigger, the carpenter, and sailmaker; bought the coppers which were put on board the vessel for cooking purposes; purchased 28,000 pounds, upwards of 10 tons, of rice; 12 or 14 barrels of beef, and half the number of pork; 24,000 gallons of water; in short he, and he alone, had the vessel prepared for the voyage. He engaged the shipping master to ship the crew, in part by himself and in part in connection with the defendant. And thus on the 20th of March had the vessel partially prepared. He then deposited in the custom house the bill of sale from Mr. Hollingsworth to him, and surrendered the register.

Things remained in this way until the vessel was ready for clearing, which was not until the 25th of March. A majority of the bills which were incurred had not up to the time of clearing been paid by anybody. After she cleared, two or three of the parties having bills, went to the office of one Oaksmith, where Marsden had a desk for the purpose of conducting his business, and there received their pay. Some of them were paid by one Machado, hereafter mentioned.

The vessel, by the agency of Marsden, and by the assistance of Darnaud, who took part in receiving the stores on board, was ready on the 25th of March to be put afloat. At this juncture Marsden employed a broker to make a bill of sale to a person called Samuel S. Gray,

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and it was done. The register bond in the custom house is regularly signed by some person representing himself as Samuel S. Gray, *in which signature the prisoner joined as master of the vessel*. The law requires the *master* to make oath that *he* also is a citizen of the United States; and all the custom house proceedings and papers assume that he has done so, and that he is one. But for some reasons not properly explained, it appeared that at about this time the officers of the *New York* custom house violated their duty in this respect; not exacting this oath from masters. In the *bond*, which was signed by Darnaud, as master, Gray alleged himself to be a citizen of the United States. The broker procured a respectable man as surety, who did not know who Samuel S. Gray was, but went security simply because Marsden requested it, through his agent.

The vessel cleared with those papers, which the prisoner, as captain, was by law bound to take with him; but previous to the clearing, it went through another usual transaction—the shipping of the crew. A crew is shipped in this way: A shipping master is generally the agent of the owner, as well as the agent of certain boarding house keepers who have crews to ship. He opens a shipping office, and sailors go to him and sign the shipping articles, a large printed document prepared in accordance with an act of Congress. Some of the sailors make their marks, and some write their names in such a way as to be illegible. This paper is not taken with the ship. It is sent to the custom house and is there deposited. This crew list has appended to it the oath of a notary public that *he* has received *sufficient proof of the American character of the vessel* and of the crew named on the ship-

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ping list. The law also requires that the owner or master shall deposit a copy, under oath, of these shipping articles, which shall be sworn to by the master before a notary public, as a true and exact copy of the original paper. Of this paper, which is deposited in the custom house, the master takes a copy certified under the seal of the collector. That copy goes with the vessel and forms the paper which is contemplated in the crew bond, and in relation to which the bond is given. All this was complied with. One Pentz, was employed by Marsden to ship the crew for this vessel. After the vessel had sailed, Marsden called and paid Pentz for the shipping of the crew.

Who the Samuel S. Gray was did not at all appear. Marsden was not forthcoming. Nobody identified Gray; nobody knew him. The position of the prosecution was that the transfer from Marsden was a mere fraud; a device to get Marsden's name as owner from off the custom house registry. And the position therefore taken was that Marsden was still owner in whole; or in part with Machado.

On the other hand there was verbal evidence of people's belief that Marsden was a man of no property when he made the purchase and outfit, and evidence of the fact that all the funds came to him from one Machado, of New York, a Spaniard, naturalized here, as the prosecution proved by the production of his papers, and who in this matter, was, as appeared by his own oath, merely the agent of another Spaniard *not naturalized*, one Rivero, who he said had placed the funds in his hands. Who this Rivero was did not appear at all; nor was he shown to be a man of property. He had been on board the vessel during her voyage to Africa, as one of her two or three

captains; but beyond this *nothing whatever appeared, Rivero had no written evidence of ownership, so far as appeared; nor was his ownership shown in any way but by the mere fact that Marsden and Rivero had told this Machado (so he swore), that he, Rivero, was owner of the vessel, and the fact that Machado received and paid the funds as Rivero's; doing it sometimes in a pretty loose way. How Marsden was paid for any of his services was not shown by anybody. That most if not all the funds which Marsden used in the matter passed through Machado's hands, was plain enough; but Machado's books were relied on by the prosecution to show that all this was but a form; and that, in part at least, the funds belonged to Marsden, or to Machado, or to both.

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* See *Supra*,
p. 145, note.

So far as concerned the citizenship of the prisoner—a matter important only in case the vessel was really not owned by an American—it appeared that this person was a native of France, and came to this country twelve or fourteen years before this voyage; that he then represented himself as a Frenchman, as he also did when arrested under the warrant in this case; that he could speak little or no English, when he came here; that he lodged at French boarding houses, associated with French people; and when applying for a place on an American vessel was asked how he expected to get the place when he could speak nothing but French. On the other hand, he appeared to have in fact renounced his own country; had hailed for twelve or fourteen years as from the United States; had never used an American protection when shipping for foreign ports; had represented himself in fact, if not positively sworn, at the custom house, that he was a citizen of the United States; and had acted

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as captain of a vessel which he knew was registered as American; a privilege allowed by law to American citizens only.

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Mr. *Vandyke*, for the United States, to the jury :

The owners of vessels about to engage in the slave trade being certain of prosecution as pirates if discovered, and of the penalty of execution if convicted, make, invariably, and from the origin of their enterprise, arrangements as complete as possible, to defeat all prosecution. The highest efforts of their ingenuity, sharpened by experience of criminal courts, as to what is needed, are brought into action for this purpose. The arrangements consist in a substratum of agents and of foreigners and of men ready to swear to anything; all at first invisible; but in case of a prosecution to be projected upon the scene. The real actors are Americans; and so long as they are not overtaken by the justice of the nation, we hear of no other actors in the enterprise. No foreigners, no false custom house oaths are necessary. But when a criminal is seen, then the stalking horse comes into view to hide him. The false fabric is raised to shut out from view the true one. All that was pre-arranged for the rear ground—agencies, foreigners, perjury—comes forth complete in every part.

In an indictment for slave stealing, the jury ought to look at *facts* rather than any testimony not clearly pure. That perjury will be committed by witnesses of the defence is certain. Pre-arrangements are made for perjury in all slave voyages. Unless this slave voyage is unlike every other, and an exceptional case merely, a matter not to be presumed, there will be, as of course, witnesses at hand from the start to show

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that the ownership is a different one from that which appears, had been sworn to and universally believed.

When, therefore, the jury sees an American citizen acting from beginning to end as owner; with all the muniments and *indicia* in his own name—treating, buying, rigging, equipping, shipping crew and sending out of the harbor a vessel which he swears is his alone; when in a most dangerous enterprise he declares himself from the beginning to the end of the enterprise to be owner; when the man who is now set forth as owner—a foreigner—a man confessedly engaged in cheating our government and in carrying on under false pretences an illegal and infamous traffic—cannot show that he ever had one *written evidence* of ownership, even of the most secret kind against an American, a stranger to him, a man of worse character even than himself; when the whole evidence of the Spanish ownership rests not upon even a secret written agreement, but rests on one *Spaniard's* or his clerk's testimony of what these two infamous characters once told him; and upon the simple fact that the money with which the ship was bought passed through his hands as the money of a foreigner—in such a case, on an indictment where that exact kind of evidence is almost certain to come forth, no matter what the truth may be, then, in such a case, the jury should look at facts, as much more likely evidence of truth than oral testimony. I mean of course than *such* oral testimony. Had Marsden died, to whom would this ship have belonged? Living or dead, what evidence had Rivero of ownership against Marsden, or against anybody? This is not the way in which merchants—Spanish slave merchants—deal, and is irresistible to show a lie, *ex post facto*. Marsden is said to have had

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no property. One witness believes so; knowing little about him. What evidence is there that Rivero had property either? Who is Rivero? He was no merchant. He was one of the captains of this voyage. Where did *his* property come from? Concede that he put money in point of fact into Machado's hands, and had the semblance of property. Marsden, as apparent owner of the vessel, had much better semblance of property. Who put the money into Rivero's hands? Let them show that. Was it American or was it Spanish capital? Let them show that. Rivero was a mere figure in the case; and used because he was a Spanish figure. How was Marsden paid? Let that be shown. Did he receive commissions? Or had he an interest as part-owner in the voyage? If he was a mere agent he received some compensation in money. Has an attempt been made to show that he received anything in that way? The inference is irresistible that if not owner by original purchase, he was paid by an interest of some kind in the voyage; and that the vessel in part was navigated in his behalf. That is enough. It is a matter of no importance how small may have been the interest which Marsden, or Machado, or any other American citizen may have had in the vessel; if one farthing, it is sufficient, because it is a part of an interest in the vessel. If from all the circumstances of the case as brought before us, as to the parol and paper title and the circumstances under which the vessel sailed, we should believe that any person belonging to this nation had an interest in the vessel, we are relieved from all difficulty, so far as the point of jurisdiction is concerned. Nor does it matter whether that interest be a legal or equitable one, whether it appear upon

the face of the paper title, or has been covered up in fraud, to be inferred from the circumstances of the transaction, with the view of avoiding the responsibilities imposed by Congress on those engaged in this unnatural and wicked traffic. If any person was so prominent in the management of the business connected with this vessel as to lead one to suppose that he owned it wholly or in part, it is enough for the purposes of this cause, even though his interest may have been attempted to be covered up and secreted, so that he might screen himself behind the responsibility which rested on the shoulders of all those engaged, and which now rests upon the shoulders of this unfortunate defendant, a fact which may be proved directly or indirectly, or which may be inferred from all the circumstances surrounding the transaction, just as we would infer any other conclusion to which our minds may be led upon a subject of fact involved in any cause. And all that is said in regard to the question of ownership, is applicable to the other question raised by the act of Congress, whether—the ownership being foreign—the vessel was navigated for or in behalf of a citizen of the United States.

Then finally, supposing the Spaniard, Rivero, was owner, and that the vessel was not navigated in any way in behalf of any citizen of the United States, was the prisoner a citizen? The term citizen is capable of more meanings than one. Darnaud has renounced his country: he hails from here as a citizen. He is captain of a vessel registered as American; which under our laws presupposes citizenship in him. He has, no doubt, sworn that he was a citizen. The notary public certifies him as such: His domicile is here: Letters of naturalization are not necessary to convert

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a foreigner into a citizen in all meanings of the term In the well known case of martin Koszta, our government interposed and protected as its subject and citizen, against European monarchs, a man who had merely declared an intention of becoming a citizen. The word citizen has therefore other meanings than the one which it has under our naturalization laws. A man may be a citizen who is neither born here nor naturalized. The court will instruct you on this subject. But when a man enjoys peculiar privileges of citizenship, and renouncing in fact—much better than renouncing in form—his own country, adopts another as his home, it seems but natural that he should be deemed a *citizen* of that other, so far at least as to make him amenable to its laws, when they punish its “citizens” who engage in a traffic denounced by the voice of nearly every Christian nation of the earth.

Messrs. *C. Guillou & R. P. Kane* having replied, the charge of the court—Judge GRIER, who had been present during most of the trial, being now absent—was thus delivered by

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KANE, J. *Gentlemen of the jury.* The thirty-nine counts of this indictment are included in two general propositions. The 1st, that the accused, being one of the ship’s company, of a vessel which was at the time owned or employed by a citizen or citizens of the United States, did receive or did detain on board one or more negroes, with intent to make slaves of them; or that he did aid and abet others in doing so. The 2d, that the accused did some one or more of the acts, which are charged and as I have recited them, on board of a vessel; no matter by whom owned or employed; he being a citizen of the United States.

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The 1st class, regarding his own national character as of no consequence; but making the character of the vessel, the national ownership of the vessel, the national character of the owners of the vessel, an indispensable criterion; the 2d, disregarding the nationality of the owners and employers, but fixing itself upon the national character of the captain, or member of the ship's company, represented by the defendant.

I have to say to you, in the first place, that every one of the elements of the charge, as I have recited them before you, must be proved by the United States before they can claim a verdict of guilty. That is to say: the United States must prove, that this accused prisoner was one of the ship's company of a vessel, which was at the time owned or employed by a citizen or citizens of the United States, and that he then and there received and detained on board one or more negroes with intent to make slaves of them; or did aid and abet others in doing so: Or else, the United States must satisfy you, that the defendant, being himself a citizen of the United States, did one or the other of these acts on board a vessel, without regard to her ownership, upon the high seas.

Among the elements which alternatively constitute the crime, is the citizenship of the accused, or that of the ship's owner. It is not merely a question of jurisdiction in the view of the court, according to the ordinary use of the term. It is a question of the essential elements of the crime. The offence is a statutory one. It not only describes the place where the offence may be committed, and the circumstances which shall go to make the offence, but it defines the persons who alone are capable of committing it. And the statute

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is as inapplicable to other persons as it is to other places or to other acts.

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There is good reason for this, a reason sufficiently obvious. Every nation has absolute jurisdiction of crimes committed within its own territory; and may make whatever laws it chooses, declaring what acts shall be crimes if committed there. But no nation can legislate for others. And as the high seas are the common territory of nations, those laws only which all nations recognize are the laws of that common territory by which all men are bound. No State can any more legislate for the high seas, than a corporator can legislate for the corporation of which he is a member, or an individual citizen for the county or State in which he lives. No nation can make or enforce special laws for the high seas, without infringing upon the rights of other nations. It was an effort on the part of England, like this, to declare what should be the law affecting neutrals, third persons, individuals of other nations, which led to our war of 1812. It was an effort on the part of France, to prescribe what should be the muniments of title borne by American vessels on the high seas, which embroiled us in hostilities with that country in the early part of the present century. It was an attempt of the same sort, or in the same spirit, by Spain, by Denmark and by other foreign powers, which at different periods led to reclamations, stern and in the end successful, on the part of the American government, for the damage sustained by American citizens by reason of acts of unauthorized jurisdiction.

In a word, no State can make a general law applicable to all upon the high seas. Where an act has been denounced as crime by the universal law of na-

tions, where the evil to be guarded against is one which all mankind recognize as an evil, where the offence is one that all mankind concur in punishing, we have an offence against the law of nations, which any nation may vindicate through the instrumentality of its courts. Thus the robber on the high seas, the murderer on the high seas, the ravisher on the high seas, pirates all of them, recognizing no allegiance to any country, because the very act violates their allegiance to all their fellow men, if caught, may be punished by the first taker. And so too, if the nations of the so-called civilized world, who are fond of calling themselves the whole world, and of arrogating to themselves somewhat too readily all the rights that belong to the whole world, could for once unite in defining that some one act should be regarded as a crime by all, it may be that after such an agreement by all the world, the courts of any one nation might without reference to the nationality of the individual undertake to punish the offence he had committed.

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But so soon as we leave these crimes of universal recognition, the jurisdiction of a State over the acts of men upon the high seas becomes circumscribed. It is no longer an exponent of the law of individual or international morals. The owner of a farm cannot legislate for the highway, however conscientious or wise he may be. All the jurisdiction which any nation exerts, or can properly affect to exert upon the high seas, except as the representative of the general sense of mankind, declared in the general law of nations, is founded on the control which every nation has over its own citizens, and their conduct wherever they may be found, or over the acts of others who for the time have subjected themselves to our jurisdiction by ac-

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cepting the protection of our flag. If you or myself, entitled to the protection of our country, and with our country pledged to defend us wherever we go, not having yet passed within the territory of a foreign sovereign, but being on the common highway of nations, violate the laws of our government, we may be punished for violating them. And if we, being citizens owning vessels under the American flag, entitled, therefore, to protection as American vessels, engage others, whether foreigners or citizens, to be our voluntary associates in violating the laws of our country, and they are caught violating them upon the common highway of nations, they may be brought here and punished.

But it is only in the two cases, where the individual accused is himself a citizen, whose allegiance to his government continued while he was upon the common highway of nations, or where the property upon which the individual was found perpetrating a wrong was property recognized as American, owned by Americans, it is only in these two cases that the United States can make a law which would be binding upon all citizens or which could be enforced by courts of justice; and I do not hesitate to say, after something of mature consideration, that if the Congress of the United States, in its honorable zeal for the repression of a grievous crime against mankind, were to call upon courts of justice to extend the jurisdiction of the United States beyond the limits I have indicated, it would be the duty of courts of justice to decline the jurisdiction so conferred. It is for this reason, then, that our Government, in denouncing guilt, and punishment against acts like those charged upon this prisoner, denounces them against acts done by Ameri-

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can citizens and by persons sailing under the sanction and auspices of American citizens on vessels owned by American citizens or in their employ.

That the offence is called in our particular statute piracy, does not vary the legal position and consequences of the case. Piracy is essentially an offence against the universal law of the sea. It assumes that the individual has thrown off his allegiance to mankind. He is the enemy of all who meet him. The slave trade, however horrible it may be, is not within that category. It has been recognized as lawful for many centuries by all the nations of the world. It is only within a few years, within the memory perhaps of every one whom I am addressing on the jury, that the first declaration was made by national authority that it was a crime. And up to the present moment there are nations professing to be civilized, Christian nations, that have refused peremptorily to unite in so recognizing it. It is not, therefore, piracy—such a piracy, no matter whether so called in our acts of Congress or not—not such a piracy as constitutes a man the enemy of his race, and confers upon every court of justice in every land the right to try and punish him for his acts. It is no further unlawful in the estimation of courts, it is no further unlawful in the estimation of jurors, considered as jurors, whatever it may be in the estimation of all of us as men and as Christians, than as it is distinctly declared by the laws of our own country to be prohibited to you and myself.

The element, therefore, of citizenship in the description of the crime, on the part of the ship's owner and of the master or member of the ship's company, is an essential condition and element of the crime

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Having said this, I have nearly got through with the legal propositions that have a bearing upon the case. I come to the consideration of questions of fact—questions peculiarly for you to decide; and in regard to which I desire to go no further than to gather together from my memory those portions of the evidence which bear upon particular points.

First, then, was this vessel owned by an American citizen, or navigated for or in behalf of an American citizen or citizens, at the time of the acts charged in this indictment. In the first place she was American built, and her American character remained unchanged, of course, until in some way or other, she was divorced from it. It remained unchanged, when Mr. Hollingsworth, acting on behalf of a company of gentlemen, but acting in his own name, purchased her, and took out her register in his own name—all those gentlemen being American citizens. She was at that time a vessel owned by American citizens. Those citizens, through the instrumentality of Mr. Hollingsworth, sold her to Marsden, for the time being of New York, and a citizen of the United States, who paid for her and took title in his own name; whether as sole owner, or whether like Mr. Hollingsworth, owner with others, or whether as agent or representative of others, without personal interest on his part, does not appear.

It is to be lamented, and it may be a subject of lamentation not only among moralists, that the preliminaries of title which are prescribed by our laws, and which exact the solemn oath of the party as to

the nature of his title, the extent of it, and the number and names of his associates in the purchase, and that the consequent records of title to American ships, are so often irregular and erroneous. You have had a single instance of it, in the case of a gentleman of unimpeached honor in our commercial circles, who makes or rather signs at the custom house a formal oath, that he is the sole and exclusive owner of the vessel, when, in point of fact, it was altogether otherwise; when he was neither the sole nor exclusive owner, but only one of six or seven or eight owners.

The title, the paper title, as between the persons who have themselves taken part in its fabrication, may be regarded as conclusive against them; that is to say, that if you, sir, have executed a bill of sale in my favor, and permitted me to take the register in my name, you shall not be permitted to deny afterwards that you had sold the vessel; and if I accept from you a bill of sale, and go and take out the register, and hold it in possession, I shall not hereafter deny that you sold me the vessel. So far the register may with safety be received as evidence of the transaction. But to say that the execution of a bill of sale by you to me, the surrender of the register by you, and the issuing of a new register in my name, is to be given as evidence against our learned friends who have argued this case before us, who neither could have known nor prevented what we were doing, who had no opportunity of interfering with us, who, if they knew that the whole transaction was a spurious one, an imaginary sale, intended merely as a disguise, and had gone into the custom house to protest against it, would not have been even listened to; to say that they should be bound by what we had done, would be to say that

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Still, the title, the apparent title, passed from Hollingsworth to Marsden, and it had something more of strength than would properly attach to its paper character, inasmuch as Marsden paid his money before he took it. And thus, at first glance, and till something was shown to the contrary, we should have reason to believe that he was the owner; and he being an American citizen, the vessel continued the property of an American citizen, after passing into his hands. Had, then, the case rested here, it would have been proper for us to require some directness of proof from the parties who should undertake to deny the American ownership of the vessel.

But the United States do not stop here. After showing the title of Marsden, they go on to show that the title, the paper title, the bill of sale title, the register title, passed afterwards to Gray. He, also, is alleged to be a citizen of the United States on the face of the papers. And thus the paper title, upon which, so far as it was worth anything, Marsden's ownership rested, passed altogether by the transfer of that same paper title to another man, described in like terms as a citizen of the United States.

But it is asserted on the part of the United States, that although some one in the name of Gray went through all the formalities at the custom house in the authentication and record of the bill of sale and in procuring the register, yet that this Gray was never the owner at all; and in thus asserting that Gray was never the owner, the United States denounce the truth and efficiency of that title to ownership which is disclosed by the papers of the custom house.

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Passing, then, outside of the paper title, the title according to the custom house, whose records have only conducted us into a difficulty from which they fail to relieve us, how stands the fact of ownership? Who was it that did own this vessel? The defendant says Marsden never owned it, just as the United States say Gray never owned it; and both of the paper titles being thus impeached, we must seek for the real ownership in the other evidence that is before us. How stands that evidence?

We had the cotemporary declarations of Marsden, that he bought the vessel and was fitting it out not for himself, but for a Spaniard named Rivero. We had also the declarations of Rivero, that Marsden had bought for him. We had the evidence of a witness called by the United States, Mr. Oaksmith, that Marsden had no means of his own, wherewith to buy the vessel; and we have the evidence of Mr. Machado, and of his clerks, one of them, if not both, that the funds disbursed by Marsden in the purchase of this vessel belonged to Rivero. I am not aware that there is any other direct evidence going to show whose funds purchased that vessel.

If you are satisfied from what the witnesses have said here, that in truth and in fact Marsden was not a man of adequate means to purchase this vessel; that he bought the vessel for a Spaniard, with funds obtained from that Spaniard; that Spaniard declared that the vessel had been bought for him; that he accompanied and controlled Marsden while the vessel was getting fitted out, and directed his correspondent and banker to make advances to Marsden from time to time for the payment of bills, the court says to you, that in the absence of some proof to the con-

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trary, you are called to believe that Marsden was not really the owner of the vessel, but only the agent for the purchase. It is unnecessary for the court to say to you, conversant as some of you are with the everyday transactions of a business community, that the largest mercantile dealings are conducted and concluded in the names of brokers and agents, without declaring the names of their principals; and that large funds are every day in the year put in the hands of agents to negotiate the purchase of ships and cargoes, without an indication that there are third parties interested in the purchase.

On the other hand, to contradict these assertions you have the examination of books of account of Mr. Machado and of Marsden, the collation of entry with entry, and the argument ingeniously and very powerfully pressed by the district attorney, that the books show these stories to be false; that Marsden was really a man of adequate wealth; that Rivero never did buy the vessel; that the purchase was never made for him; that the funds which Marsden got from Machado were not Rivero's funds, but were Marsden's own, or Mechado's own, or that at least they were not Rivero's.

You are to judge then, gentlemen, upon all the evidence; I make no further comment upon it, so far as regards this point of the case; whether the funds and ownership in point of fact—not according to the paper title, for that paper title fixes it on Gray—but whether the ownership in point of fact was in Marsden, or Rivero, or Machado, or any body else. You are to say whether Marsden's disbursements were of his own funds; whether he was in whole or in part the real beneficial owner of this ship; or whether it was

Rivero or some one else who bought and owned her. If it was Rivero for whom Marsden acted, whose funds he disbursed, for whom he bought and held, then this vessel was not a vessel belonging to an American citizen, or navigated for or on behalf of an American citizen.

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I feel the more confidence in putting this point to you strongly and clearly, because I see that were a different doctrine to be held by our courts, there would be scarcely any protection whatever against the arts of slave traders. If the paper title, the formalities of the custom house, the record of the bill of sale, and the issuing of the register, indicated what was the ownership of the vessel, no one American, base enough to engage in the slave trade, would ever be found on board a vessel with an American register, or an American bill of sale. However American her ownership in fact, she would be sold to some Rivero, or some anonymous Portuguese; the Portuguese flag would be hoisted, and the American owner stepping on board would exult under the protecting fraud of an alien flag, and a fabricated bill of sale.

I instruct you, gentlemen, that the law does not regard the semblance, but the fact. Was this vessel in truth, owned by American citizens?

If there was a mask, tear it off, and look at the reality? Did this vessel belong to the man who was on board, the Spanish captain as he was called, or did she belong to an American citizen?

Passing then from this point, I come to the other category under which the different counts of the indictment arrange themselves; merely reminding you that unless you are satisfied beyond a reasonable doubt, that this vessel at the time belonged to an

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American citizen in whole or in part, or was navigated for or on behalf of an American citizen, then all those counts of the indictment in which the charge is made, that the vessel was so owned, are not proved, and your verdict as to them must be not guilty.

Of all the charges in this second class, it is an essential element, that the accused was a citizen of the United States at the time of the acts. You have heard some discussion as to the meaning of this term, citizenship of the United States. It has a plain, simple, everyday meaning; and that meaning you may safely take without a definition. It is that unequivocal relation between every American and his country which binds him to allegiance and pledges to him protection,—that goes with him wherever he goes, stamping him a traitor if he be found in the ranks of an enemy, as a criminal if violating her laws; but watching over him, and covering him with the shield of her power, though he traverses the sea under a stranger flag, or sojourns on a foreign shore. It is not the citizenship of domicile; the citizenship, if you may call it so, of the man who comes to be a guest upon your shores, and who is entitled to protection, just as the stranger becomes a member of your household when you invite him to stay for the night. That is not the citizenship the act refers to; for that subjects to no liability whatever, beyond the territorial limits of the country in which the domicile is. Nor is it what some law books have called judicial citizenship; for that has no relation to a subject like this, but applies only to the question whether the party can sue or be sued in the courts of the United States, or whether their litigation must go over to the State courts. Nor, gentlemen of the jury, is it what some might call diplo-

matic citizenship, for want of a better term ; that grade of inchoate citizenship which may be claimed by one who has declared his intention to become a citizen hereafter ; prospective in its allegiance, actual in its asserted rights ; about which diplomatists have disputed somewhat, but which I believe our courts have not yet recognized ; such is not the citizenship meant by the act of Congress. It is citizenship, such as yours and mine—that citizenship which makes us constituent members of this country, and that binds us everywhere to obey its laws, because it protects us everywhere. The right and the duty are inseparable. They begin and end together.

How then stands the question as to this prisoner ? In the first place, it appears that he was a Frenchman by birth and language. Such were his own declarations if you believe the witnesses who have been examined before you. The declarations of a man after he is arrested for a crime, or when he is about to commit a crime, may be of very little value ; and the man who, to prepare himself for going on a slaving voyage, had taken care to announce to the world that he was not an American, would gain very little advantage from his cautionary declarations. But if, at a time when he was not interested in disguising or denying his true national character, he had declared himself either a Frenchman or an American, having no object in falsifying the truth—not meditating the violation of a law which might subject him to punishment in case he were a citizen of one nation rather than of the other—if by common reputation, in the ordinary converse of his fellowmen, his nationality was recognized as in accordance with his declarations—presenting thus the same sort of evidence of his national

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character that I have of yours, that you have of mine, that we both have of the gentlemen who surround us in this court—then surely his uncontradicted declarations are entitled to some credit. Just as in a question of pedigree; we speak of parentage and birth-place, on the authority of generally accepted opinion, which resolves itself at last into very little if anything else than the assertions of the party, or his household, or his neighbors. Seafaring men rarely travel with the family bible in their pockets.

If then, it be true, that this man did some fourteen or fifteen years ago arrive here, a Frenchman, apparently unable to speak English, that he did represent himself as born in France, that he did go to a French boarding house, that his associates were French, as this witness testified, that when he applied to one of them to get him a place on board a vessel, he was told it was useless for him to expect to get a place when he could not speak a word of English—having all this before us, and uncontradicted, we are to take him to have been a Frenchman or a foreigner fourteen years ago. If so, when or how did he become an American citizen? When was it? Where was it? We have had in the case of Mr. Machado, the proper proof by which the individual, foreigner by birth, is shown to be an American citizen now. The production of his letters of naturalization, and proof of his identity with the party named in them. We have had no such proof in regard to this man.

What then have we as a substitute? His assertion or admission that he had become one? Doubtful evidence, gentlemen, I may say to you. I should fear very much in a grave cause like this to determine upon the guilt of the prisoner, simply because he had

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said at a former time, that he was such a citizen as was amenable to our laws of the sea. I have seen too many of the oaths even, that pass through the custom house; I have seen too many good names signed to the papers that were received in that office as proofs of citizenship, and ownership, and identity of invoiced, with actual values, to be very anxious to begin the game of punishing capitally for a misrepresentation of fact at the custom house. Yet if a man has gravely asserted that he was an American citizen, still more if he swore that he was an American citizen, he cannot complain if we so far vindicate the principles of morality as to accept his oath for truth, until he gives us some better reason for believing that he lied. But in this case, did this defendant ever assert or admit that he was an American citizen. That he never carried a protection as an American citizen, as the district attorney has very truly observed, matters little; for very few American citizens carry protections now, and I trust the time may be very distant when they shall again be thought necessary.

But it is argued, that the custom house papers declare or rather assume the citizenship of this prisoner. If so, they would be of value just so far as he had been party to them, or had recognized their correctness; and no further. Look then through all these documents, and say whether you find in them any assertion or recognition by the prisoner, of his being an American citizen. So far as I remember them, those papers from the custom house contained no proof at all as to the citizenship of the accused. In fact, the oath which the act of Congress had required to be made, and which would have decided the question of his citizenship, so far as a custom house

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oath can attest anything, that oath prescribed by the act of Congress, was for some years before this transaction, pretermitted as obsolete by the custom house at New York; and thus it happens there is no such oath taken by this accused, by which you can test the question whether he claimed to be a citizen or not. Then you have the crew list. So far as I remember that instrument, it is certified by a notary public that he received sufficient proof of the American character of the vessel, and of the crew named in the list itself. I may say to you gentlemen, that this certificate of that notary public, that he received sufficient proof, and his oath superadded to the instrument that he received such proof, are of little avail to the prosecution. It is this court, which has to judge of the legal relevancy of the proof; you are to judge of its sufficiency. But that crew list upon examining it, unless my recollection deceives me, does not contain any name by which it is alleged this prisoner has passed himself. There is, therefore, no admission, even supposing that he himself had made oath to the accuracy of the crew list, the oath being as to the American character of the vessel, and of the crew named in it. All these, however, like the other facts and circumstances which have been presented to you by the United States, are for you to consider of.

I have gone over two of the points; there is a third. If you are satisfied that the vessel belonged in whole or in part to American citizens, or that the prisoner was an American citizen; if you are satisfied that this prisoner was engaged on board as one of the ship's company, no matter whether as master or as mate, or as interpreter, or as doctor, if he was engaged on board in the prosecution of these acts, there re-

mains still a point you are to be satisfied upon, of the intent on his part to reduce these people to slavery. I do not mean that it is a question whether this was really a slaving voyage or not; it seems to have been settled all around that it was a slaving voyage; but the character of the prisoner's intent as to the individuals who were on board is an essential topic of consideration by the jury. The seamen who shipped for the Island of San Thomas, as probably supposing they were going to St. Thomas, in the West Indies, and who found out they were going to a little island on the coast of Africa, after they were on the high seas, bound to obedience by the maritime code, and exposed to peril and outrage if they refused; such seamen cannot be said to have sailed with the intent to make or sell slaves.

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We had a case of piracy before this court some years ago, which was presided by my brother Grier, during the whole trial, and in which he made the charge. The evidence in some respects, not in a great many, but in some respects resembled that which has been before you. And I feel, that I shall do well to close the remarks I have to make upon this case by quoting some of the language of my eminent colleague. I adopt it entirely as my own; but I know that I shall secure for my own opinion greater weight by a reference to his. He said as follows:

“The United States can assume jurisdiction and a right to punish this offence committed on the high seas, only in consequence of the allegiance or citizenship of the offender, or because the act was done on board or by the crew or ship's company of a ship or vessel owned in whole or in part or navigated for or in behalf of a citizen or citizens of the United States.

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Hence it lies at the very foundation of this case, that the prosecution establish to your satisfaction the fact, either that the defendant is a citizen and owing allegiance to the United States and bound by her laws; or that not being such, the ship or vessel was owned in part or in whole by citizens. That the vessel assumed an American character abroad, is in evidence, that she was sent by the consul to an American port, that at Rio she applied to the American consul and held herself forth to the world as American; this affords a strong presumption of her American character, her national character. But it is not a necessary consequence therefrom that her owners were American citizens. Denizens or resident foreigners might have owned her. But then again, she sailed from New London as an American vessel. The testimony affords a strong probability that she was owned by Americans;—and as the testimony is wholly for your consideration, the court will not say that it is insufficient, if it be satisfactory to your minds.

“But the court think it their duty to observe, in a case of such awful and solemn consequences to the defendant, that the jury should be cautious how they deal with mere probabilities. What hindered the government from sending to New London, and bringing here the register, and the very owners themselves, to establish this fact beyond a doubt? Have they a right to call on you to convict on doubtful or probable testimony, when they had it in their power to have removed the doubt and furnished certainty instead of probability? Without wishing to interfere with your prerogative as to the facts, I venture to say that you would not be unreasonable if you required it at their hands.”

In a word, gentlemen, I ask you to take the spirit of these remarks, and apply them to this case. When the United States call upon a jury to give a verdict of guilty, they are bound to prove the defendant's guilt of the charge set forth in the indictment. Not, of course, by direct, irrefragable evidence—such evidence, where intent is an element of the crime, is rarely if ever possible—but by evidence which may satisfy the judgment and conscience beyond a reasonable doubt. You will not convict because you suspect; on the other hand, you will not refuse to convict, because you have doubts of legal policy, or sympathies that are to be shocked by a capital execution. You will answer upon the evidence before you, just as you would in a case that called for your cautious because responsible action, in the concerns of daily life, fearlessly honestly, as men who have sworn to do justly between him and the State.

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THE CHARGE.
KANE, J.

Mr. *Vandyke* asked the court to charge, that if the jury believe Marsden exercised the ordinary, usual acts of ownership in the fitting out of this vessel, these acts of his, being part of the *res gestæ* should be taken into consideration in determining the question whether the vessel was navigated for or on his account.

Judge KANE. They are so no doubt. Yet these acts on his part may be colored and explained by attendant circumstances. If Mr. Marsden acted as owner of this vessel in purchasing her, paying for her, repairing her, fitting her for sea, bargaining and paying for her ship's stores, procuring her pilot, all these are acts of ownership, and would certainly show that if

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KANE, J.

he was not the owner, she was at least navigated on his behalf. But then if in direct connection with these acts of his, and running alongside of them, it be proved as fact, that the funds which he was using were the funds of a third person not a citizen, that he had no funds of his own, that he spoke of himself as a mere broker or agent, and was recognized as such by the banker who put him in funds, and by the third person whose funds they were; then, if all these be deemed true and not merely devices to disguise the truth, they would establish the fact of ownership in another, just as in a different aspect, they would be proof he was the owner of the vessel.

VERDICT, NOT GUILTY.

INCIDENTAL POINTS.

In the course of this trial, the following points, aside from the main case, occurred and were decided.

First Point.

1st Incidental
Point.
Discharge of
Juror.

After the prisoner had pleaded not guilty, and a jury had been called, one of the jurors who was in delicate health, stated to the court, that certainly he would be unable to go through the cause without an attack of illness. The prisoner having exhausted his twenty challenges, the court, stating that it had no power to discharge a juror after he was once sworn, unless by consent of parties, suggested to the counsel that in view of the great inconvenience likely to arise, the record *by consent* might be so far falsified as to strike out the juror's name, and so as not to show that he had ever been called or sworn at all; and that the de-

fendant should have the privilege of another challenge. That in this way both parties would be estopped from alleging the irregularity as matter of error. Being so recommended by the court, this course was agreed to by the counsel on both sides.

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1855.

1st Incidental
Point.
Discharge of
Juror.

Second Point.

When the prosecution had opened its case, and being about to go on with its evidence, had sworn a witness, the prisoner's counsel asked the court to instruct the witness and the other witnesses generally, before any of them were examined, and with a view to their own protection, that they were not bound to make any statements criminating themselves.

2d Incidental
Point.
Privilege of
Witness.

GRIER, J. We cannot do this. It would put it in the power of a witness by a mental reservation to tell only what he pleased, and to be the judge of what would criminate him, and the crimination might be moral, political or criminal. The court will interfere when necessary.

Third Point.

To prove the reputed American character of the vessel on which the piracy alleged in the principal case was charged to have been committed, and the public declaration of her ownership by a citizen of the United States—such character and ownership being essential facts to sustain the indictment—the prosecution offered in evidence the vessel's original registry at the custom house in New York; promising to follow this proof up with other evidence of owner-

3d Incidental
Point.
Custom House
Registry.

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1855.

3d Incidental
Point.
Custom House
Registry.

*Act of 31 De-
cember, 1792.

ship. This *registry*, as is generally known, is made under an act of Congress* declaring what vessels shall be "denominated and deemed vessels of the United States, entitled to the benefits and privileges appertaining to such vessels." It prescribes that before the registry can be made, the owners or one of them must swear or affirm that according to the best of his or their knowledge and belief, the vessel is owned wholly or in part by a citizen of the United States.

† 2 Wallace,
Jr. 264.

Objection being made by Mr. *Guillou* and Mr. *Kane*, who relied on *The United States v. Brunet*†, that case was distinguished by Mr. *Vandyke*, D. A. U. S. from this, because there the evidence was neither preceded nor to be followed up by any other evidence. It was the only evidence the prosecution relied on; and though offered as *prima facie*, was in truth relied on as conclusive. Here we shall follow the matter up by direct evidence of actual ownership. We wish to prove the history of this vessel from her build to the present day, and these papers are offered as part of the history of the vessel, and as part of the record and title of the vessel. What they are worth will be hereafter a question. As part of the paper title of the vessel, and as showing through whose hands she has passed, and in whose hands she now is, they are at least *competent*.

GRIER, J. You can prove that these are the original custom house papers; and they may go to the jury as part of the case generally, and to show under what public character the vessel appeared and acted. What they are worth in law as evidence of actual ownership by a citizen of the United States, is matter to be considered hereafter.

OCT. SESSIONS,
1855.*Fourth Point.*4th Incidental
Point.
Comparison of
Handwriting.

The custom house registry of ownership of the vessel, which was now in evidence, being found to be in the name of one Gray, who on those books thus appeared to be owner, and the prosecution alleging that the name of Gray was a simulated one, which had been fraudulently assumed by some person in order to get the apparent ownership out of Marsden, a former registered, and still the real owner—the prosecution in order to prove the fraud, and that the name was thus simulated, now offered to prove by an expert that two different signatures on the registry, to wit, the signature to a bond, a crew bond, and a manifest which purported to be made, one by one person, and one by another, were in fact made by the same person under different names. But the prosecution had not proved, nor was it admitted by the defence, who had made either signature. The question put to the expert was, “Look at the signatures to the bond, to the crew bond, and to the manifest, and say whether they are, to the best of your knowledge and belief, by the same person?”

Mr. *Guillou* objected to the question. Unless you have an acknowledged signature, or one proved by one who saw it signed, for comparison, you cannot bring in the evidence of a mere expert.

Mr. *Vandyke*. That is true in the case of a forgery. I know that there must then be a test paper by which the other signatures are to be proved. But I wish to show that the same man, *whoever he be*, signed the manifest, the oath, the crew bond and the register

OCT. SESSIONS,
1855.

4th Incidental
Point.
Comparison of
Handwriting.

bond ; that they are all signed by one and the same person. If I offered this testimony for the purpose of showing that a certain A. B. signed those papers, then it would be necessary for me to have an admitted signature of A. B., in order to prove that he did sign them ; my object now is only to prove the fact that the signatures on all the papers are by the same person.

Mr. *Guillou*, in reply. In a capital case any doubtful or dangerous evidence ought to be wholly excluded. It does not do to let evidence in to the jury, expecting that an antidote will come from the charge of the court. An effect in a criminal case is produced by the mere admission of evidence, and the charge cannot destroy this effect. How uncertain is the evidence of an expert on a question of this kind ! If you would bring every expert from Maine to Louisiana, you would find one half of them would decide directly contrary to this witness on the stand. Nor has the counsel on the other side any right to open so wide a field for controversy ; he is able to produce any number of witnesses he may want on the subject, but the defendant who is a stranger here and a foreigner, has not the same means to do so.

GRIER, J. If the evidence were offered to prove that the prisoner had made both these signatures, it would be incompetent unless you had first an acknowledged or proven signature of the prisoner as a *datum* for a standard of comparison. Perhaps, indeed, it is only in cases of forgery where there is a similitude of handwriting, that such evidence is admitted at all. But here Mr. Vandyke is trying to prove ex-

ternal facts unconnected with the defendant. He has to show that the defendant did certain acts, that he went to Africa. He has not only to do that, but he must show more—he must show the national character of this vessel, her history, and a hundred other matters; and then her name painted on her stern. So, also, he gives the public register connected with her, showing the public character the vessel acted under. He then shows that a man by the name of Marsden is connected with her, and is the owner; that he paid her bills and fitted her out to go upon this voyage; that he had a bill of sale to her, and that he is a citizen; that under suspicious circumstances, there was a transfer made to a separate party, who, he alleges, is a man of straw—nobody at all—and in order to prove it so, wants to show that the signature of the captain and that of this party appear to be the same, done by the same hand. Now if that be a fact, would it not be some evidence in the case to show that it is so. He has put himself upon showing that this man is not the true owner; that there is a bill of sale made to him which is a mere sham; that it is made to nobody, and this is legitimate evidence in the case; not that it fixes this man as Darnaud, but that the transfer upon the record shows upon its face these two signatures were done by the same hand. Whether the signatures appear to be done by the same hand, that, I think, is a question you can put to an expert. Though the testimony is of rather a dangerous character, and not much to be relied on.

OCT. SESSIONS,
1855.4th Incidental
Point.
Comparison of
Handwriting.

LEAVITT v. LOGAN.

[CONSTRUCTION OF WILL : LIFE ESTATE : REMAINDERS, ETC.]

A devise to A., for her maintenance and support during life, and at her decease to become the property of B., not to be subject to sale or mortgage, but to descend to his children free and unencumbered ; but in case he has none living at his death, to become the property of C., in fee simple, or of her heirs, if she be not then living.

Held, to give 1st. A life estate to A. 2d. A similar estate to B. 3d. Remainder in fee to B.'s children, vested as to those born at the testator's death, and opening to let in others as they were born. And 4th. A contingent remainder to C. in fee.

V. SESSIONS,
1855.

STATEMENT.

LOGAN made his will as follows: "I devise to my wife Julia Logan, for her maintenance and support, my house and lot, &c., during her life, and at her decease to become the property of Joshua Logan; the said property not to be subject to sale or mortgage, but to descend to his children, free and unencumbered; but in case he has no children living at his death, then and in that case to become the property of my daughter, Julia Richardson, in fee simple, or of her heirs, in case she be not then living."

The question was, what estates did these parties take respectively in the premises? points which after argument by Mr. *Shaler* and Mr. *Loomis* for the complainant, and by Mr. *Williams* on the other side, were thus decided by

THE COURT'S
OPINION.

GRIER, J. If the will had made no farther provision, than that on the decease of Julia Logan, the premises should become the property of Joshua Logan,

NOV. SESSIONS,
1855.
THE COURT'S
OPINION.

it might well be construed as a gift of the remainder in fee to Joshua. But such an intention is manifestly inconsistent with the provision that the property, while in his hands, was not to be subject "to sale or mortgage." The words "descend to his children," might seem to imply that according to their strict legal meaning his children were to take by inheritance from their father. But such a construction would not fulfil the intention of the testator. Unless the children take as purchasers a remainder in fee, their title would be liable to be defeated by the father.

To fulfil the intention as clearly expressed, the will must be construed as giving,

1st. An estate for life to Julia Logan.

2d. To Joshua for life.

3d. Remainder in fee to the children of Joshua; vested as to those then born, and opening to let in the other children as they shall successively come into existence.

4th. And lastly, a contingent remainder in fee in Julia Richardson.

DECREE ACCORDINGLY.

[AT PITTSBURG.]

SICKLES v. THE GLOUCESTER COMPANY.

[MODE OF TAKING EVIDENCE IN EQUITY.]

Under the practice of the courts of the United States, as fixed by the judiciary act of 1789, a party may examine or cross-examine witnesses *ore tenus* in equity suits as well as in suits at common law; the power given him in this respect by the 30th section of that act, not being taken away from him by any subsequent act, nor by the 67th rule of practice for the courts of equity promulgated on the 2d of March, 1842, nor in any other manner.

AP'L SESSIONS,
1856.

STATEMENT.

THIS was a question as to the mode of taking evidence in equity suits in the Federal courts; and arose upon a bill in equity for the infringement of a patent. The case was thus:—

The 30th section of the act of September 24th, 1789, which organized the courts of the United States, and is commonly called the judiciary act, enacts “that the mode of proof by oral testimony and examination of witnesses in open court, shall be the same in all the courts of the United States, *as well in the trial of causes in equity*, and of admiralty and maritime jurisdiction, *as of actions at common law.*”

* §25, Act
of 29 April,
1802.

A section in an act of 1802,* says “that in all suits in equity, it shall be in the discretion of the court to order the testimony of witnesses to be taken by deposition,” with certain provisos.

Notwithstanding this first act, it had never been the practice in equity cases in this circuit, nor in any other circuit, so far as was known to the court, or counsel, to take testimony *ore tenus*, nor, except when

proceeding under the act of 1802, otherwise than according to the rules and practice of the Court of Chancery in England; where, as is known, the testimony is taken by the commissioner on interrogatories and cross-interrogatories previously filed, and without the presence of the parties or their counsel; and where the testimony, when taken, is sealed up, until an order is obtained for publication of it, after which no more testimony can be taken.

AP'L SESSIONS,
1856.
STATEMENT.

On 2d of March, 1842, the Supreme Court of the United States promulgated a body of "Rules of Practice for the Courts of Equity," the 67th of which rules runs thus: "*Commissions to take testimony may be taken jointly . . . by both parties or severally by either party upon interrogatories filed by the party taking the same . . . ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission. . . . If the parties shall so agree, the testimony may be taken upon oral interrogatories,*" &c. The 68th rule is thus: "Testimony may also be taken in the cause . . . by *deposition*, according to the acts of Congress."*

* 1 Howard
lxii.

An act of Congress passed soon after, to wit, on the 23d of August, 1842,† gives to the Supreme Court † §6. "full power and authority . . . to *prescribe* and regulate and *alter* . . . the forms and modes of taking and obtaining evidence . . . in suits at common law, or in admiralty and in equity pending in the District and Circuit Courts . . . and generally to regulate the whole practice of the court."

With these statutes, rules and practice in existence, a rule for a commission had been taken by the defendant; and Mr. *E. N. Dickerson*, counsel of the other

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STATEMENT.

side, having filed the complainant's affidavit that the evidence in the case, if taken before a commissioner upon interrogatories, and cross-interrogatories, would operate unjustly and prejudicially to his interests, obtained a special order that he might have power to cross-examine the witnesses *ore tenus*, and "that the testimony so taken shall have the same effect as if taken under the 67th rule" above mentioned.

Mr. *Jenks*, for the defendant, having protested before the commissioner against such a mode of taking testimony, and having declined to cross-examine, now moved that the depositions should be suppressed, and that an examination of all the witnesses should be had privately before the master.

Against the
Deposition.

In favor of the motion: The court had no power to make the order on which this testimony has been taken. The only ground on which it can be pretended that testimony taken, as this has been, can be read, is the 30th section of the judiciary act of 1789. But,

I. That section has been *interpreted* in our favor by a constant practice of sixty-seven years. The Supreme Court has, moreover, interpreted it by its own rules. The 67th rule shows that the English practice, in its outlines at least—which practice prevails over our country generally, where there are courts of equity, and has always prevailed in this court,—was meant to be continued. However plain the language of the judiciary act may seem to *us*, we are bound to receive an interpretation so long and so clearly put upon it by the practice and rules of the Supreme Court; an interpretation hardly inferior in solemnity

to a judgment of the court. Indeed, an uninterrupted practice of sixty-seven years can hardly be said to be, in any respect, of less value than a judgment. It is the best of all judgments. "The great authority with me," says C. J. Bridgman, "is constant practice if I am well informed." It is "law solidified into fact."

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1855.

Against the
Deposition.

II. The 30th section of the judiciary act has been in effect *repealed*. The act of 23d August, 1842, gives to the Supreme Court power to "*alter*" the "forms and modes of taking and obtaining evidence." The 67th rule, which we rely on, was indeed made in March, 1842, and before the act of 23d of August was passed; but it has been acknowledged, ratified, re-adopted and republished, by being retained and constantly acted upon up to this hour.

III. The truth is, that the section in question of the old judiciary act, meant to establish a mode of taking testimony which it thought would be regarded by the profession as more convenient than the old one. But the old one was familiar to the bar, they liked it best, and never abandoned it. This provision, therefore, of the judiciary act, without being formally repealed, became obsolete, effete and forgotten.

GRIER, J. The *jus pretorium* of the Roman law, from which our system of equity has its origin, was introduced when chancellors were priests. The writ of subpoena is said to have been first devised by Chancellor Waltham, Bishop of Salisbury. It met with opposition at the beginning by Parliament, "because its proceedings were according to the civil law and the law of holy church, in subversion of the common law." But notwithstanding the opposition then, and also of Sir Edward Coke and the common law courts

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OPINION.

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at a later day, the chancellors persevered in extending their jurisdiction, and when the office ceased to be in the hands of ecclesiastics, a system of jurisprudence and jurisdiction was built up on a rational foundation by the learning and ability of Nottingham and his successors. Yet it still retains some of the features which originally caused the enmity of the common lawyers and the Parliament. One of these is the mode of taking testimony. At common law it was considered as essential to justice and the protection of the rights of the litigant that the witnesses should be examined in presence of the parties to be affected, and of the tribunal whose decision was to be governed by the testimony. The mode of taking testimony in chancery, as introduced from "the civil law and law of holy church," is by secret inquisition. The reason given for this practice is said to be "in order to avoid the risk of defects being discovered in the course of taking it, and false evidence being procured to remedy them."* As a reason for a foregone conclusion, this was no doubt considered satisfactory, though it might as well read "to avoid the risk of defects and falsehood being discovered, and true evidence being procured to remedy them."

* Adam's
Equity 64.

And yet, while it is true that as a general rule of courts of chancery, all witnesses will be examined on interrogatories, either by the regular examiner of the court or through the medium of commissioners specially appointed, it has never been decided that a chancellor had no power to order otherwise in a particular case, where he might consider it necessary to a proper investigation of the facts. No court is so enslaved by its general rules as to be powerless, when justice requires an exception to their operation. Accordingly,

numerous cases of exceptions may be found in the books of practice.* The practice also of sending issues of fact to a court of law to be tried by a jury and according to the principles of the common law, may be truly said to be an exception to this ecclesiastical rule of trying facts by secret inquisition, and an admission of its incompetency for a proper investigation of the truth.

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OPINION.

* Daniel's
Equity Prac-
tice, 1048.

II. But assuming a court of equity to be so bound up by their general rules, that they have no power to deviate from them in a special case for sufficient cause shown; is there any statute or iron rule of practice which compels the courts of equity of the United States to adhere to this policy of the civil and ecclesiastical law as a fundamental principle in the administration of justice?

The act of 1789, constituting the courts of the United States, declares "that the mode of proof by oral testimony and examination of witnesses, shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law."

Whatever, therefore, may be the force and binding effect of this fundamental principle as to the peculiar "mode of proof" in the English courts of chancery, it is clearly repudiated and abolished as a rule of practice in the courts of equity of the United States.

It is not a fair construction of the 67th rule of court, which imputes to it an intention of repealing or overruling an act of Congress admitted to be within the scope of its constitutional power.

It being found inconvenient and dilatory in practice, and seldom necessary to a proper investigation

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1856.

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OPINION.

of causes, to have witnesses examined *ore tenus* in open court, in chancery cases, the 67th rule merely provides, that "after the cause is at issue, commissions to take testimony *may* be taken out in vacation as well as in term."

When witnesses live at a distance, the parties are compelled to resort to this rule in order to obtain their testimony; and in most cases, when the witnesses might be brought into court, this practice is pursued as most convenient. Judges have been rather disposed to discountenance the production of witnesses in court, on account of the delay consequent on an *ore tenus* examination. Besides, counsel, who are more apt to look to books of chancery practice than to their own statute books, have either not been aware of the rights of their clients, or not thought it a matter of sufficient importance to urge them. Hence it is, that the old practice has been generally pursued, and perhaps enforced, without much inquiry.

The act of 1789 is a fundamental statute; and we have, therefore, as a fundamental principle in the administration of equity in the courts of the United States, that the mode of proof by oral testimony, and examination of witnesses in courts of equity, shall "be the same as in actions at law." Either party has a right, therefore, to cross-examine witnesses *ore tenus*, and when not examined in open court, to have notice of the time and place of taking the testimony, so that he may see the witness face to face, and thus examine or cross-examine him. In many cases, as has been shown by experience, it is absolutely necessary that the party be allowed this privilege, in order to elicit the whole truth, and save himself from a garbled statement of it, which may be as injurious as direct

perjury. This may be said to be the general rule, and any deviation from it is the exception. The party who claims his right is not asking a favor of the court, or making a demand which the chancellor in his discretion, may deny; but is demanding a right guaranteed to him by the law of the land; not one held at the discretion of a judge, nor to be abolished by custom or rule of court. The secret examination of witnesses within reach of the process of the court, is contrary to the policy of the law; either party may object to it, at his discretion, and the court are bound to allow it. A court may dispense with their own rules in a special case, but cannot deny to a party a right guaranteed to him by statute, or the law of the land.

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1855.
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OPINION.

The circuit courts of the United States have original jurisdiction in patent cases, and do not exercise their authority merely as auxiliary to a court of law, and for a more effectual remedy. Hence we do not feel bound in all cases to send a party to establish his right in a court of law, before granting a final injunction. In many questions of originality and infringement of patents, the concurrent opinion of twelve men, with little knowledge of the principles of science and philosophy which affect the case, may give but little satisfaction to the conscience of a chancellor: Hence it is becoming more common to examine these questions in courts of equity, without the aid of a jury, unless where the issue depends rather on the credibility of witnesses, than the value of their opinions as experts or philosophers. But such cases cannot be properly brought before the court by secret examination of the witnesses. It is almost impossible to frame interrogatories in chief so as completely to elicit

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the truth, where the witness has to refer to complex models or drafts. The whole truth can seldom be obtained, or falsehood detected, unless by a sharp cross-examination *ore tenus*, by skilful counsel. It is sometimes the case also, and in fact, too often, that the party, or his counsel, prepare the answers for their witnesses after consultation, so that the witness comes before the examiner and reads off his answers to the several interrogatories, as prepared for him by the party who produces him. That such things are sometimes done, we know; but *how often*, we cannot know. And however ready a court may be to suppress testimony thus made up, the fact must be known to the opposite party before he can make proof of it; and this secret mode of taking testimony, gives no opportunity for its discovery.

As a question of mere policy and the proper administration of justice, we believe that the truth of a case can be better eviscerated, by an *ore tenus* examination of the witnesses by counsel, than by the secret method of inquisition borrowed from "Holy Church."

We are of opinion, therefore—

1. That this portion of the peculiar policy of courts of equity has in the courts of the United States been rejected by statute, and that it never has been a fundamental principle in their administration of equity.

2. That the 67th rule of the series of rules promulgated by the Supreme Court, in 1842, does not affect to annul the act of Congress, or the policy established by it.

3. That a party has therefore a right to demand an examination of witnesses within the jurisdiction of the court, *ore tenus*, according to the principles of the common law, either by having them produced in court, or

by having leave to cross-examine them face to face before the examiner.

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1855.

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OPINION.

4. That the court had not only power to make the rule or order complained of in this case, but was bound to allow it, not only as requisite to a proper development of the facts necessary to its just decision, but also as a right of the party guaranteed by law.

MOTION DENIED.

[AT TRENTON.]

BLANK v. THE MANUFACTURING COMPANY.

[EQUITY PRACTICE: INJUNCTION AFTER EXPIRATION OF PATENT.]

The equity for an account in patent and copy right cases, is not, in the courts of the United States, a mere incident to a right to injunction; however this be by the rules of English chancery.

In the courts of the United States the right to an account may exist, and an account be directed where there can be no injunction; as *e. g.*, where the term of the patent has expired before the final hearing of the case.

SEP. SESSIONS,
1856.

STATEMENT.

THE complainant in this case—an equity bill, praying *an injunction and account of profits*—was the assignee of one Sickles, to whom a patent had been granted. The bill charged that the validity of the patent had been put in issue in a suit at common law, between Sickles and one Rodman, of which it gave an account, and its validity established by a verdict for the patentee. It charged also that the defendants were infringing the patent. The case was heard in September, 1856; a few months *prior to which date*, to wit, on the 20th of the May preceding, *the term of the patent had expired*.

Against the injunction it was now contended, that courts of equity entertain jurisdiction of patent and copyright cases only for the purpose of injunction; that the equity for the account is strictly incident to the injunction; and that, therefore, if an injunction is refused, or for any reason cannot be decreed (which it was said it could not here be, because the patent

had expired), an account cannot be given, but the plaintiff must resort to a court of law.

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STATEMENT.

GRIER, J. The proposition contended for may be considered as a correct statement of the general rule as settled in England.* This doctrine had its origin in the case of *Jesus College v. Bloom*,† as applied to bills to restrain waste; but, since that time, the exceptions to the rule have become so numerous, that the rule can hardly be recognized as existing. The bill needs only to pray a discovery for the purpose of account, and it will be sustained for the account only.

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* *Ballay v. Taylor*, 1 *Russell & Mylne*, 73.

† 3 *Atkyns*, 264, S. C. *Ambler*, 54.

The proposition, it is said in the books, cannot be maintained, that a court of equity will not interfere to direct an account when *indebitatus assumpsit* will lie at law. Nor is the converse of the proposition true, that equity will decree an account in all cases where an action for money had and received, or *indebitatus assumpsit*, may be brought. But, whenever the subject matter cannot be as well investigated in those actions, a court of equity exercises a sound discretion in decreeing an account.‡

‡ *Carlisle v. Wilson*, 18 *Vesey*, 274, &c.

As it appears in this case that, in order to ascertain the extent of the plaintiffs' damages, it might become necessary to have a discovery and account of profits, I see no good reason why the court might not retain jurisdiction of the case for that purpose, even on the principle of the English cases. The jurisdiction of the court ought not to depend on the accident of the date of its decree. If, in this case, the decree were dated on the 19th of May, 1856, the jurisdiction of the court could not be doubted, while it is challenged as impotent to give any decree on the 21st of the same month. If the complainants are able to sustain

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their case on the other points, and it was absolutely necessary to sustain our decree, that an injunction form a part of it, I would order the decree to be entered *nunc pro tunc* as of the date of the 19th of May last. The delays of a court of chancery should not be suffered to operate as a bar to the complainants' suit.

But the courts of the United States have their jurisdiction over controversies of this nature by statute, and do not exercise it merely as ancillary to a court of law. The 17th section of the patent law of 1836 ordains that "all actions, suits, controversies and cases arising under any law of the United States granting or confirming to inventors the exclusive right to their inventions or discoveries shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States.

Besides this general and original cognizance or jurisdiction over the whole subject matter, a special power is conferred on the circuit courts to grant injunctions. Having such original cognizance of these controversies, the courts of the United States do not, in all cases, require a verdict at law on the title, before granting a final injunction, or concede a right to either party to have every issue as to originality or infringement tried by a jury.

Exercising our jurisdiction in these controversies not by assumption for a special purpose only, or as ancillary to other tribunals, but under plenary authority conferred by statute, the technical reasons which compelled the English chancellor to refuse a decree for an account where he could not decree an injunction, can have no application.

POINT OVERRULED.

[AT TRENTON.]

BUCKLEY v. BROWN.

[ADMIRALTY JURISDICTION: CANAL BOATS: MARINE HOSPITAL TAX.]

The character of a boat, *i. e.*, the question whether a boat is a canal boat or a vessel of another kind, is to be determined by her build, object, and general and ordinary purposes and uses, and not upon the fact whether she is found, for part of her voyages or occasionally, in tide waters, and is moved on them by steam. If she is a canal boat in common and just parlance, she does not become a steamboat, or anything but a canal boat, by being pulled or pushed by a steam tug.

“Canal boats,” as their character is settled by this rule, “without masts or steam power,” are not liable to pay the “marine hospital tax” laid on registered vessels, by the act of July 16th, 1792, § 2; a subsequent act, *et. of July 20th, 1846*, § 1, exempting “canal boats” of this character from its operation.

AN early act of Congress* enacts “that no collector shall grant to any vessel whose license for carrying on the coasting trade has expired, a new license, before the master of such vessel shall first render a true account to the collector of the number of seamen, and the time they have severally been employed on board such ship or vessel, during the continuance of the license which has so expired, and pay to such collector twenty-five cents for every month such seamen have been severally employed as aforesaid.” The sum thus paid is retained from the wages of the seamen, and is to form a hospital fund for the support and maintenance of disabled seamen.

Under this act it had been the practice prior to 1846, to tax, indiscriminately, all hands and mariners engaged on boats and vessels trading on our rivers. This tax became a great burden to canal boats and vessels engaged in the inland navigation of Pennsylvania; and

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* Act of July
16, 1792, § 2.

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1856.

to relieve them from this burden, Congress, by an act of the 20th July, 1846, enacted—

STATEMENT.

SEC. 1. "That persons employed in navigating canal boats without masts or steam power, shall not be required to pay any marine hospital tax or money."

SEC. 2. "That all acts and parts of acts repugnant to the provisions of this act be, and the same are hereby repealed."

In practising upon this act of Congress, the secretary of the treasury issued to the collectors of the different ports of the United States, instructions to the effect—

"*First.* That under the act of 20th July, 1846, vessels or boats which ply altogether on tide and other navigable waters, cannot be deemed canal boats, entitled to the privileges of that act.

Second. That the exemption of canal boats cannot extend to boats or barges, exceeding fifty tons, although without masts or steam power within themselves, when the usual practice of such boats or barges, is to come out of the canals, and trade by aid of steamboats and propellers, on natural navigable waters from district to district."

With these laws and instructions in force, the plaintiff, being captain of a registered boat, applied to the defendant, collector of the port of Philadelphia, for a renewal of a license, which that officer, acting on the instructions of the treasury, refused to give him without a previous payment of the usual "marine hospital tax." The boat was in the ordinary canal shape, of 123 tons burden, without masts or steam; and her voyages were between Port Carbon, an interior town among the Pennsylvania coal hills, and the city of New York, by way of the Schuylkill Navigation

Company, and the Delaware and Raritan canal. Her whole distances were 228 miles, of which 151 were on canal, and 77 on tide water, on which last she was towed by steam tugs. The captain, having paid the money under protest, the right of the collector to have demanded it was the question now before this court, to which it came by *certiorari* from the Common Pleas.

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1856.
STATEMENT.

Mr. *Vandyke*, D. A. U. S., for the collector. The act of 1792 has not been repealed. It applies to the plaintiff and his boat, unless the boat comes within the exceptions of the act of 1846. The privileges of that act are confined not to canal boats generally, nor to any at all times, but to such boats, being "without masts or *steam power*." The boat must be *bonâ fide* a canal boat, and prove her quality by staying on canals: and using neither steam nor masts; else by giving to river and steamboats the form, size and name of canal boats, river boats would go clear entirely. Even if an ordinary canal boat navigates rivers chiefly, it was never meant that she should go clear. The act of 1846 makes steam the test. It matters not how steam is applied; whether in front, and so pulls the boat, or behind, and so pushes it, or on board, and so propels it. If steam moves the boat entirely, and on tide waters, the boat is not a canal boat within the meaning of the act of 1846; an exceptional act, as has been stated, and in derogation of the rights of the government. Vessels are now made in compartments. The steam is on one, the freight on others, the passengers on the remaining. The different parts of the vessel are attached; but in structure are as separate as the canal boat and the tug.

For the Tax.

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Against the
Tax.

Mr. *W. M. Tilghman*, on the other side, contended that whether a boat was a canal boat or not, depended simply on the fact what sort of navigation she was constructed and adapted for. If, tested by these rules, she was a canal boat, she was a canal boat wherever she was, whether on a canal, on a tide river, or on dry land; and no more became a steamboat because she got out on tide water and was towed by a steam tug, than she would become a railroad car by being put on the wheels of railroad trucks and rolled over a railroad; or a dwelling house, by the canal's becoming emptied of water, and the boat left on dry land. Certainly, the act made "steam power" a test; but it means steam power as part of the boat. This boat was as much a "canal boat *without* steam power," after she was tied to the tug, as she was before; and just as much as *she* would have been "without masts," if she had been tied to a sailing vessel propelled by wind. It is the tug and the sailing vessel which have the steam and the masts. The canal boat has neither, and therefore, of course, is "without" them, and so exempt. Though an exceptional act, the act of 1846 is to be construed fairly and like ordinary acts, and its meaning is to be settled by the courts, and not by secretaries of the treasury, who look to that which chiefly concerns *them*, government interests.

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GRIER, J. It is a great grievance that the revenue laws passed by Congress have become so numerous and complicated, that it is often difficult to ascertain what is the existing law on any particular subject. In the construction of other laws, when one statute supplies or changes the provisions of another, the latest is construed as a repeal of the former. But on the construc-

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tion of this mass of contradictory revenue laws, it would seem that the statute which gives the highest duty, the largest fees, or the severest penalties, is never repealed by a later act which mitigates the penalty or diminishes the fees. Acts giving certain fees or forfeitures to certain officers, become almost like the laws of the Medes and Persians, incapable of being repealed. At least, it is hard for human ingenuity to discover language for the purpose which may not be perverted by ingenious misconstructions.

It is part of the history of this act of Congress, that it was originated at the instance chiefly, and for the relief of a certain class of citizens of the commonwealth of Pennsylvania.

Much of the internal trade of this country, which was formerly carried on wagons over turnpikes, or by coasting vessels trading from port to port, is now carried on by means of canal boats. In the transportation of coal, these boats are loaded among the mountains, dragged by horses or mules down to the harbor of Philadelphia, towed from the harbor to the New Jersey canal, again dragged by animal power, to be again tugged or towed into the harbor of New York. The trade thus carried on is entirely internal, as much so as if done by wagon or railroad car, and calling as little for the interference of the revenue laws. There is nothing of a maritime character about this mode of transportation, save the boat. The persons who conduct or navigate it, the steersman of the boat, his assistant, the man or boy who drives the mule, have probably never seen the sea, till their arrival at New York. They are, therefore, astonished to find that, as soon as their boat touches brackish water, it has become the subject of a new code of

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laws, originating in Rhodes or Italy, and in the isles of Oleron and Rhe; that though born and bred mountaineers they have, by magic, become mariners, and may libel the coal boat for their wages, or hypothecate it for oats and provision, on the return voyage, &c., &c., and a thousand other incidents of admiralty jurisdiction, and custom house supervision and fees, which have about as much application to them and their boats as they have to Conestoga wagons.

For the purpose of relieving trade from these annoyances of admiralty law and custom house exactions, this act of Congress was passed, and the question for the courts to decide in this case is, whether we can by any ingenuity so construe, or rather misconstrue, it as to render it wholly ineffectual.

It is proposed to do it by means of the following sorites or syllogisms:

A canal boat is a canal boat only while it continues to be a boat on a canal; and although it has no mast or steam engine on board, yet when a steam tug is attached to it by a rope for the purpose of taking it from part of a harbor or river to another, it becomes *ipso facto* a steamboat, because it has been tugged or propelled by steam, and so remains ever after, it having lost the character of canal boat forever, by a single contact with the rope of a steam tug. The man, the boy and the mule, are thus converted into mariners, and entitled to libel for wages in admiralty, and to an interest in the marine hospital fund. *Ergo*, they are bound to pay the same fees as were exacted before this act was passed.

The objections to this reasoning and conclusion are, that they shock common sense, and annul an act of

Congress specially made to apply to these very persons and things.

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Consequently the fees exacted from the plaintiff were illegally exacted, and he is entitled to recover according to the conditions of the case.

DECREE ACCORDINGLY.

MARTIN v. THE SOMERVILLE COMPANY.

[ACTS OF ASSEMBLY IMPAIRING CONTRACTS.]

The constitution of New Jersey adopted in 1844, limits the powers of the Legislature and separates them from those of the judiciary, and adopts the prohibitions of the Constitution of the United States against laws impairing the obligations of contracts, and further, prohibits the depriving a party of any remedy for enforcing a contract which existed when the contract was made. Hence:

Where the Legislature passed an act for the relief of the creditors of a manufacturing corporation, providing that certain persons should be authorized to sell all property mortgaged for the payment of bonds, at public sale, to the highest bidder, *free from all encumbrances*, and after paying certain expenses and costs, should distribute the proceeds to the corporation's creditors, according to the priorities of their several liens, it was held that such legislation was unconstitutional, by reason of its impairing the obligation of the contract between the mortgagors and the mortgagees, and depriving the mortgagees of a remedy which existed at the time the contract was made.

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1856.

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THE Somerville Water Power Company, incorporated under the laws of New Jersey, and doing business in that State, issued, in 1848, to different persons, a number of negotiable bonds, payable in 1853, and amounting in all to \$50,000; and to secure their payment, executed (as under its charter it had power to do) a mortgage of all its real estate, property and franchises to trustees for the benefit of the bondholders; one of the conditions of the bonds being, "*that if default should be made in the payment of the \$50,000, or any part of it, it should be lawful for any holder to enter upon the premises, and to sell and dispose of them, and of all benefit and equity of redemption of the corporation, and to make a good and sufficient deed,*

&c., to the purchaser in fee simple, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the premises."

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The title to the lands and property of the company having been encumbered by judgments, and embarrassed by decrees, sales and conveyances subsequent to this mortgage, the company or its assigns, and some of its creditors, sought the aid of the New Jersey Legislature to enable them to put things on a new and better basis, and with that view to clear off all liens and make a perfect title to the property. For these purposes two acts of Assembly* were passed. Taken together, they recited that certain persons had been appointed receivers of the property in a suit in the Court of Chancery of the State of New Jersey, to protect and superintend the real estate, property and franchises of the said company; that the concerns and interests of the company had become so involved in complicated difficulties and embarrassments, that the parties interested therein as creditors and stockholders could not have full and satisfactory relief, without protracted and expensive suits in the courts of law and equity, They recited further that it was represented by the parties interested in the property and affairs of the company, that the company was abundantly able to pay off and satisfy every just claim against it, and that a favorable opportunity was now presented to sell and convey its property, and that the interests of creditors and stockholders would be promoted by a sale of its real estate with all its franchises and works clear of all encumbrances, and had prayed for legislative aid in the premises. They then enacted

* Acts of 10th
and 18th of
March, 1856.

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1st. That the receivers might sell the real estate, franchises and works of the company, &c., at public sale, to the highest bidder, *free and clear of all encumbrances, and free and clear of all mortgages, judgments and other liens whatever.*

2d. That these receivers might then *deduct from the proceeds* of such sale all reasonable allowance for commissions and services *heretofore rendered by them as such receivers*, and pay out of said proceeds all expenses *by them incurred* in effecting and consummating such sale, and *all such costs and expenses as have heretofore been incurred in a suit pending in the Court of Chancery of New Jersey, wherein they had been appointed receivers.*(A)

3d. That after the same were so paid, the receivers should next, out of the proceeds, *pay off and satisfy all just and lawful debts*, due from said company to any creditor or creditors, in the order of priority in which they might lawfully stand of record, and after the payment of such debt or debts of record should, out of the balance, pay and satisfy all other just and lawful debt or debts which were not of record, if said balance was sufficient for that purpose, and if not sufficient, then in proportion to the respective amounts of such debts or claims, and after the payment of all said last mentioned debts, should ascertain by due and legal evidence, who, as contributors to the property, franchises and work of said company, or as stockholders in the same, were entitled to the balance of said proceeds, and in what proportions, and should pay to such persons their respective proportions of such balance.

(A) Of this suit the complainant had had no notice, and was not a party to it.

4th. That the receivers *should have power to subpoena and examine witnesses*, touching the duties and trusts reposed in them by these acts, and should make report to the chancellor of the State, of what they did in the premises; and that *any person aggrieved by their proceedings* should be at liberty to file exceptions to such report in respect to his own particular interest therein, which exceptions *should abide the final decree of the chancellor* to be made therein.

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Under these acts, the receivers sold the whole of the mortgaged property for \$50,000; the bonds never having been paid, and now amounting with interest to \$60,000. Before the sale was made, however, the complainant who held some of the bonds which he had bought in common course in the New York market, and on which bonds default had been made in the payment of both interest and principal, filed this, his bill in this court for the foreclosure of the mortgage, and a sale of the property, or so much thereof as might be necessary to pay the amount due on his bonds; and for an injunction to restrain the receivers from proceeding any further under the acts of the Legislature already mentioned:

The constitution of New Jersey adopted in June, 1844, says:* "The powers of the government shall be divided into *three distinct departments*—the legislative, executive and judicial. And no person or persons belonging to or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others," &c. It says again:† "The Legislature shall not pass any bill of attainder, *ex post facto* law, or *law impairing the obligation of contracts*, or *depriving a party of any remedy for enforcing a contract which existed when the contract was made.*"

* Article III.,
§ 1.† Article IV.,
§ 3.

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The constitutionality of the acts of Assembly was, therefore, the point in question.

Mr. *W. L. Dayton* and Mr. *A. O. Zabriskie*, for the company, referred to many legislative acts of the State of New Jersey, which, showed that from the foundation of the Province a species of chancery jurisdiction had been exercised by the Legislature; which acts, though often operating to substitute, against the creditors' will, one fund for another, had, nevertheless, never been regarded as impairing the obligation of contracts, or in any way unconstitutional; the main purposes of the contract under a new form being still kept in view. *Potts v. The Trenton Water Power Company** was such a case. There the Trenton Water Power Company owed much money secured by mortgage, which the mortgagees were not pressing; and became insolvent. A receiver was appointed at the instance of some creditor; a subsequent one perhaps. But the receiver could make no sale free of liens; and the Legislature passed an act to give him power. He did sell, professing to sell free of liens, and his sale under the act was declared to have discharged the liens. Of course the remedies of the mortgagees had been violently taken away; but the proceeds having been paid into chancery and so substituted in the place of the land, the legislative act was declared by the Court of Error and Appeals to be constitutional.

* 1 Stockton
593.

After argument by Mr. *Ransom* and by the *complainant in person*, the court's opinion was given by

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OPINION.

GRIER, J. Previous to the 29th of June, 1844, the State of New Jersey was governed by the old colonial constitution, adopted on the 2d of July, 1776. This

contained no bill of rights nor any clear limitation of the powers of the Legislature. The history of New Jersey legislation exhibits a long list of private acts and anomalous legislation on the affairs of individuals, assuming control over wills, deeds, partitions, trusts and other subjects usually coming under the jurisdiction of courts of law or equity. Consequently, the decisions of the courts of New Jersey on questions arising under the old constitution, cannot be cited as precedents applicable to the present one, which carefully defines and limits the powers entrusted to the Legislature, the executive and the judiciary. It is very desirable that the constitution of a State should be construed by its own tribunals, and we regret that the researches of counsel have not furnished us with such precedents. The case of *Potts v. The Trenton Water Power Company*,* has reference to an act passed before the adoption of the present constitution. That act was declared by the court "not to impair the obligation of any contract, and to be remedial only." The first mortgagees gave their assent to the sales made under it, and others could not object to it as made without their authority. In this important respect it differs from the present case, and cannot be relied on as a precedent.

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* 1 Stockton
592.

The validity of this act has been challenged on several grounds. If found invalid on any one, we need not examine the others.

The constitution of New Jersey has not only carefully limited the powers of the Legislature, and separated them from those of the judiciary, but it adopts the prohibitions of the Constitution of the United States against "*ex post facto* laws, and laws impairing the obligation of contracts," and with this addition,

OCT. SESSIONS, 1856. "or depriving a party of any remedy for enforcing a

THE COURT'S contract which existed when the contract was made.

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It is not contended that this act comes under the category of an "*ex post facto* law;" and if it be merely remedial in its character, as defendants contend, there can be no valid objection to it under this head of the constitution.

Does it impair the obligation of the contract between the mortgagees and mortgagors, or deprive the mortgagees of any remedy which existed when the contract was made?

The act and supplement must be construed together as forming one act. It is entitled "An act to relieve the creditors and stockholders of the Somerville Water Power Company," &c. It sets forth, in its preamble, certain representations, made no doubt by those who procured the act, showing plausible reasons for such legislative interference, but the validity of the act must be judged from its actual operation on the rights of parties subjected to it, and not by the pretences put forth by the preamble. This may show that the Legislature acted in good faith, and believing that their interference would wrong no one, but not that such was the actual result. Legislatures cannot be too cautious, when asked to interfere with special legislation for particular persons or particular cases, on *ex parte* representations. They cannot call all parties before them and judge upon a full hearing; this is for the courts. Their action may not always be unjust, but it may be and often is tyrannical and injurious.

Let us inquire what is the contract, and how is it affected by this act?

The mortgagees of this property hold the legal title

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in trust for the several bondholders, who may properly be treated as the real mortgagees. They may be said in common parlance, to have a "lien" or "security" on the property mortgaged, but they have it by force of their legal title to the property. It is an estate in fee simple, defeasible only by the payment of the debt. When the condition of the obligation is broken, the mortgagees may enter on the premises and recover the rents, issues and profits thereof, till their debt is satisfied. If they see fit, they may appoint an agent or attorney, who may enter on the lands under their direction, and make sale of the same in satisfaction of the debt. This disposal of the mortgaged premises is to be made according to the discretion and judgment of the mortgagees, and not of another. No subsequent encumbrancer or assignee of the equity of redemption can divest their estate contrary to their will, unless by a tender of the debt due. They cannot be compelled, to suit the convenience of others, to put up the property to sale at a time or in a manner which might lessen or injure their security.

Now by this contract the estate of the mortgagees is defeasible only by payment of the debt. But this act permits the receiver to dispose of their estate, and does not provide that the debt shall be first fully paid. It permits the receiver to sell for any sum, whether it be sufficient for such purpose or not. And the receiver has made a contract of sale for a sum insufficient by many thousands of dollars. This is making a new contract for the parties and impairing the obligation of the mortgage. It may be truly said, "'tis not so written in the bond." The mortgagees may dispose of their security for less than the amount of their debt, but no other person can.

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2d. The obligation of this contract is moreover impaired by this act, in that it gives a precedence to certain indefinite costs and charges (not costs of the sale merely) to be paid out of the proceeds of the property before the mortgage debt. This is in direct contravention of the contract by which the estate was conveyed to the mortgagees free from all charges and encumbrances.

3d. The mortgagees had, by their contract, a remedy to be used at their own option and discretion as to time and mode of sale, and by law they had the remedy of entry on the premises and receiving the rents and profits. This act deprives them of both, contrary to the letter of the constitution of New Jersey, without invoking the aid of the cases of *Bronson v. McHenry** and *McCracken v. Hayward*.†

* 1 Howard,
311.
† 2 Id. 611.

We have not thought it necessary to review the very numerous cases on this subject, or to attempt any metaphysical definition of what constitutes the "obligation of a contract;" as it is clear that any legislation which defeats the estate of the mortgagee, without payment or tender of the whole debt due on the bonds, which gives a preference to posterior liens, and which deprives the mortgagee of his remedy given by the covenants of his contract, as also that given by the law of the land, "impairs its obligation," and is contrary to the letter and spirit of the constitution of New Jersey. This act may be remedial as to the owners of the equity of redemption and those having liens against it, but the mortgagees have a right to say "*non in hæc fœdera veni*"—we have never agreed to have our estate defeated to suit the convenience of others.

PERPETUAL INJUNCTION DECREED.

PATERSON v. EVANS.

[PRACTICE : EJECTMENT.]

A judgment in ejectment by default for want of a plea, without a rule to plead and thus putting the defendant in default, is irregular ; and this whether the suit be brought in the way usual in the State courts of Pennsylvania, and now allowed by rule of court, in the Federal Court of the Third Circuit, or whether it be brought in the English way formerly used and still allowable in this court.

THIS was a motion to set aside a judgment by default in ejectment ; the case being thus :

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STATEMENT.

By a statute of 1806, the Legislature of Pennsylvania abolished the common law mode of instituting actions in ejectment, and substituted a writ of summons in a certain form ; ordering, also, a declaration to be filed. This act requires the plaintiff to file on or before the first term, a description of the land, and number of acres claimed. It provides also, that the defendant shall enter his defence (if any he hath) *before the next term*.

A supplementary act of 1807, provides that the sheriff may serve the writ on persons found in possession and not named in the writ, who may be made parties by the prothonotary on return of the writ ; and also, that in case of *any of the defendants not appearing*, on affidavit by the sheriff of service of the writ, *the plaintiff may have judgment by default*.

By the rules of this court, a case *cannot be set for trial without an issue*. If the plaintiff wishes to set the cause down for trial, he may either order the clerk

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to enter the plea, and thus set the case at issue, or he may rule the defendant to plead, and have a judgment in default of plea.

In this state of the law and rules, the plaintiff, Paterson, had brought ejectment against Evans, in the form prescribed by the statute of Pennsylvania; that form or the English one, being allowed in this circuit, at the plaintiff's option. The suit had been brought to *May*, 1855. The defendants appeared by counsel, but entered no plea. The plaintiff's counsel ordered the case on the trial list for *November*, 1856. When the list was called, Mr. *Williams*, for defendant, moved to have the case struck off the list, because, not being at issue, it was improperly, under the rules, set down for trial. The court (IRVIN, J.) granted the motion. Mr. *Shaler*, for the plaintiff, then moved for judgment by default, which the same court also granted. Mr. *Williams* now moved to set aside this judgment as irregular, contending that there could be no judgment without a default. Mr. *Shaler*, on the other side, arguing that the defendant, by not pleading at the second term, as the act of 1806 required him to do, was in default, and that the judgment was regular.

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GRIER, J. In our circuit, the plaintiff may bring his suit either in the old-fashioned English way, or in that practised in the State courts. If he adopt the latter way, he must conform to it in all respects. He cannot have a rule on the tenant to appear and plead, and confess lease, entry and ouster, and enter an office judgment in six weeks in case of default, as he might by the old mode. If the defendant does not appear, the plaintiff may have a judgment by default, as pro-

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vided for by the act of Assembly. If the defendant appears, he has till the next term to enter his plea, by the act of 1806, and although the act of 1807 might seem to admit of a judgment in default of appearance at the first term, the courts of Pennsylvania have decided that the two acts must be construed together, and that the judgment cannot be entered for such default till the second term. In *Vanderslice v. Garvin*, (14 Sergeant & Rawle, 243), it is said, "the plaintiff could take no step except filing his description, until the second term. The defendant was not bound to do anything till the second term." *Traer v. Purviance* (3 Penn'a Reports, 76), which says that the judgment "must be founded in an affidavit of service, and must be at the term when the default was made"—must, therefore, mean the second term, otherwise, between the two decisions, the plaintiff could have no judgment at all under the act.

But the act of Assembly does not provide that if the defendant has appeared, but has not entered his plea at the second term, that plaintiff may on motion have judgment for want of such plea without putting defendant in default by a rule to plead by a certain time. If there be no plea the plaintiff must proceed as in other cases instituted by summons. He must enter a rule to plead or judgment. If this rule be not complied with, he may demand judgment for want of plea as in other cases. We have no special rule in this court providing any peculiar practice in this respect in actions of ejectment. It is the practice in the District Court of the State, in *this county*, for the plaintiff's attorney to order the plea of "not guilty" to be entered by the clerk, in order to put the case at issue. If any plea in abatement was intended, it

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should have been entered by the second term at least, if not at the first. The defendant, therefore, has no right to complain if the only plea he can enter be entered for him. So much is it considered a matter of mere form, that a verdict and judgment are valid in ejectment where there is no plea.

The plaintiff has not pursued either of the courses, usual in this court; I mean has neither directed the clerk to enter a plea, nor himself ruled the defendant, but having set the cause for trial without an issue, he has obtained a judgment for want of plea, without any rule to put the defendant in default. This is irregular, and the judgment must be set aside. The plaintiff can always avoid the delay incident to proceeding by summons according to the State practice, if he pursues the old common law form of serving a declaration, and ruling the tenant to plead and confess leave, entry and ouster.

JUDGMENT SET ASIDE.

[AT PITTSBURG.]

SMITH v. SHRIVER.

[DEVISE : FEE SIMPLE : RESPECT DUE TO STATE COURTS BY THE
FEDERAL COURTS.]

The disposition of the Federal courts on questions relating to *real estate*, to follow the law of the States as settled by their courts of final jurisdiction, is so strong, that it will not enter into any consideration of the conflicts that have existed from time to time, or all the time, between the court under different organizations or different sets of judges ; nor go into any comparison of the respect which is due to a majority of the court, who by a bare majority carried a decision in one way, with the respect due to a very able minority who have constantly and strongly dissented. If the decisions are not *in equilibrio*, this court, on such questions, will take the law as it appears to be settled by the last decision, without entering upon the question whether on true principles it was rightly or wrongly decided.

MEYER made his will in these words: "As to such wordly *estate* wherewith it has pleased God to bless me in this life, I give and dispose of *the same* in the following manner, to wit: I give, devise and bequeath unto my beloved wife *Elizabeth*, eighty-five acres and allowance of land of my dwelling plantation whereon I now live, she to have the choice of the same wherever she thinks proper; and further, I do give and bequeath unto my said wife all my movable property or personal estate, of what kind or nature the same may be, together with all the moneys due me, by bond, note, or book account, to and for her only proper use and behoof whatever. Item, it is further my will, that my brother and sisters divide the residue of my said plantation amongst themselves, share and share alike. And lastly, I nominate and appoint," &c.

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The question meant to be raised by this suit—an

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ejectment—was that often litigated question, “did the widow, devisee, take a fee in the estate devised to her, or only a life estate?” though the question, as regarded by *this court*, was, rather, is this court at liberty, in view of certain decisions already made upon the point by the *Supreme Court of Pennsylvania*, to entertain that question as an open one at all?

The history of the Pennsylvania decisions on the point,—that is to say, whether a devise of real estate to a person, no mention being made whether the estate was meant to be for life or in fee,—does or does not carry the fee, is as follows :

The first case which arose on it in Pennsylvania, * 2 Binney, 13. was *French v. McIlhenny*, A. D. 1809,* in which Tilghman, C. J., adhering to the English precedents, held in a hard case, that no fee passed. But his associates, Brackenridge and Yeates, doubting his correctness on the special case, could not agree with him, and in fact overruled him, establishing the law that such devises do, in this country, carry a fee simple.

† 3 Binney,
476.

In 1811 came *Clayton v. Clayton*,† which—the same court being on the bench—does, without overruling *French v. McIlhenny*, certainly impair its authority.

‡ 14 Sergeant
& Rawle, 84.

In 1826 came *Steele v. Thompson*,‡ Tilghman, C. J., being still on the bench, but Judges Gibson and Duncan having come into the places of Brackenridge and Yeates, who with Tilghman, C. J., composed the court when the last two cases were decided. Gibson, J. being of Tilghman, C. J.'s way of thinking on this point, the judgment in *French v. McIlhenny*, was overruled, in favor of Tilghman, C. J.'s original minority opinion there; and the law was now settled

that a fee would *not* pass. Judge Duncan, however, dissenting strongly against this view of Tilghman and Gibson.

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In this way, with some dicta and decisions, which occasionally *looked a little the other way*, the law remained unquestioned on the circuits, and in inferior courts, until about the year 1850, when in the Court of Common Pleas of York county, the Hon. Ellis Lewis, president of that court, held that these kinds of words do pass a fee simple. His opinion coming in *Weidman v. Maish*,* before the Supreme Court, in which Gibson had now for many years been chief justice, was overruled; by a bare majority, however, whose opinion was given in a short and somewhat decided style by that very able and very amiable, but (when speaking of pretenders of any sort) not always very bland or ceremonious chief justice.

* 16 Pennsylv-
ania State,
511.

So things remained for two years; during which two years, however, the constitution of the State was changed, and the composition of the court had changed with it; Gibson, who *had been* chief justice in 1850, being now only an associate, and the only member of the late court now on the bench; and Lewis, whose opinion had been overruled, as just now stated, having risen, by popular election, from his subordinate position where he was overruled, to be a judge of the *Supreme Court*, which had the power of overruling not only others, but itself also.

Accordingly, the question was again raised on the very will on which the judgment had once been given while Gibson was chief justice, in *Weidman v. Maish*; and now in *Shriver v. Meyer*,† decided in 1852, a majority of the court (Lewis, Lowrie, and Wood-ward, JJ., in the face of powerful dissenting opinions

† 19 Pennsylv-
ania State,
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from Black, C. J., and Gibson, J.) overruled *Weidman v. Maish*, and settled as the law of Pennsylvania what had been decided on this same will by Lewis when president judge of York ; Justice Woodward, who finally turned the scale by his casting voice to that side, having afterwards declared that finding in *Weidman v. Maish*, "an opinion from a judge (Gibson) who was entitled to his profoundest deference that the will there created only a *life* estate, he had paused long before he consented to Judge Lowrie's opinion that it created a fee;" though on reflection he was well satisfied that he had done so.

Shriver v. Meyer was affirmed in the same year in *Wood v. Hills*,* by the same divided court just mentioned, st. Lewis, Lowrie and Woodward, JJ., against Black, C. J., and Gibson, J. ; and also in 1854, two years afterwards, in *Shinn v. Holmes*,† unanimously, so far as appears by the opinion of Lewis, J., who gave the opinion of the court; Gibson, Ex-chief Justice, having now departed this life.

In this melancholy condition of judicial discord in the Supreme Court of the State, parties interested now brought this same will, which had been the subject of the discordant decisions in *Weidman v. Maish* and *Shriver v. Meyer*, into *this* court, arguing that the law of Pennsylvania could not be regarded as settled under such a state of circumstances as those above given ; that the later decisions had been barely carried ; and that even if the majorities which settled them had been much larger than they were, the strong, steady, and long continued dissents of three such men as Tilghman, C. J., Gibson, C. J., Black, C. J.,—the first of them the most cautious and safe, and the other two the most vigorous and able of all the judges who

* 19 Pennsylvania State, 513.

† 25 Pennsylvania State, 142.

ever sat in judgment in this State, would, in the professional mind everywhere, and in all courts not bound to obey, as a technical authority, the last decision of the Supreme Court of Pennsylvania, carry a weight of influence which would overcome the mere weight of adjudication. In the case of this special will, it was said, there was decision exactly balancing decision, *Shriver v. Meyer*,* overruling *Weidman v. Maish*,† and leaving the law upon this will just where it was. It was said to be vain to talk about the obligation of precedents on such a point as this, and especially to talk about *Shriver v. Meyer* as being a binding precedent for anything. That case had “murdered” precedent. It went on the ignoring and abnegation of all precedent as its fundamental principle, as was thought to be apparent on its face. “But it is demanded,” says Lowrie, J., giving the opinion there, “that we shall follow the decision in *Weidman v. Maish*, where this very devise has received a construction. And why must we follow it? Because we or our predecessors have wronged one man by our blunders, must we therefore wrong others for the sake of our consistency? Does the doctrine of *stare decisis* hold us to conform to that decision? I trust that this doctrine shall never be held to mean that the last decision of a point is to be taken as the law of all future points, right or wrong?” These principles taken from the opinion in *Shriver v. Meyer*, the counsel arguing that the will gave but a life estate, held up as the light by which that case, considered as a *precedent*, was to be read.

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* 19 Pennsylv-
ania State,
87.
† 16 Pennsylv-
ania State,
510.

GRIER, J. There are two great rules in the construction of wills, which often come into conflict, and have been fruitful in litigation. One is, that the in-

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tention of the testator must prevail; the other, that the heir-at-law shall not be disinherited without express word or necessary implication.

That the application of the latter rule has had the effect of defeating the intention of a testator in ninety-nine cases out of a hundred, has often been a subject of complaint. "I verily believe," says Lord Mansfield,* "that in almost every case where, by law, a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted. For ordinary people do not distinguish between real and personal property."

* *Mitchel v. Sidebotham*,
Douglas, 730.

† 3 Term, 359.

So also, Mr. Justice Buller, in *Doe on the demise of Palmer v. Richards*,† says, "There is hardly any rule of this sort where only an estate for life is held to pass, but that it counteracts the testator's intention." Courts, thus feeling compelled to enforce this arbitrary rule, even when conscious that they were perverting the will of the testator, have been astute in searching through the *corpus* of the will for some expression from which to draw an inference of an intention to grant a fee, where words of inheritance, or technical language, expressing such interest, could not be found. For this purpose, the word "estate," among others, has been laid hold of as one which described the whole interest of the testator, when not used as a term of description.

The devise to the wife in this case contains no words of limitation, and taken by itself would convey only a life estate according to the established rule. Yet no man untrammelled by technical rules of construction, adopted by the courts, can read this will without feeling a conviction that the testator intended to give to each of his devisees his whole estate in the premises respectively devised to them. The great difficulty

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in this and similar cases is, to find some other words or phrase in the will to justify the court in giving effect to the apparent intention without disregarding the stringent rule of construction altogether, and subjecting themselves to the imputation of conjectural emendation. For this purpose the introductory words of the will have often been referred to, as showing an intention to devise the testator's whole estate. In this case the words are—"As to such worldly *estate* wherewith it has pleased God to bless me in this life, I give and dispose of the same as follows."

Whether this language in the introduction can be carried down to the dividing clause, so as to make a part thereof, and enlarge the devise to a fee, is the question in the case.

If this question were to be decided entirely on English precedents, it must be admitted, that the rule established there is, "that the word 'estate,' merely used in the introductory clause of a will, when the testator professes in the usual manner of his intention to dispose of all his worldly estate, will *not* have the effect of enlarging the subsequent devises in the will to fee."

Rules of construction of wills become rules of property, and the stability of titles greatly depends on adherence to them when once established. Hence the question in this case is one of Pennsylvania law, as settled by her own courts. How far they have adopted the policy of England in enforcing a rule of construction favorable to the heir-at-law, is a question to be decided by them. Their former decisions cannot be reconciled. Some one of them must be overruled and the others established; and if their own tribunals have done this, it is not for this court to

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criticise or doubt the correctness of their decision. The Legislature of this State in 1833 have cut the knot as to all wills made since that time, by abolishing the rule altogether, and declaring that "all devises of real estate shall pass the whole estate of the testator in the premises, although there be no word of inheritance, unless it appear by a devise over or other words of limitation, that the testator intended to devise a less estate."

This will was made before the passage of this act, and has been twice before the Supreme Court of Pennsylvania. In the argument of the case of *Weidman v. Maish*,* the introductory clause in the will does not appear to have been relied on, there being other expressions in it which, it was contended, justified the construction that an estate in fee was intended. The opinion of the court considers those arguments, disposing of the introductory clause in a single sentence. In the case of *Schrivver v. Meyer*,† the case turned entirely on the effect to be given to this introductory clause. A solemn decision of the Supreme Court supported either view of the question,—the case of *French v. McIlhenny*,‡ on one side, and *Steel v. Thompson*,§ on the other: but each decided by a divided court; Judges Yeates, Breckenridge and Duncan on one side, and Chief Justices Tilghman and Gibson on the other. In such a contest who is to decide? Not the courts of the United States. "*Non nostrum est tantas componere lites.*" The Supreme Court of the State have met the question and have decided it. After the able opinion delivered on the occasion of *Schrivver v. Meyer*, by Mr. Justice Lowrie for the court, and Mr. Justice Gibson dissenting, further discussion of the merits of the question would be super-

* 16 Pennsylvania State, 510.

† 19 Pennsylvania State, 88.

‡ 2 Binney, 13.

§ 14 Sergeant & Rawle, 89.

fluous—all has been said that can be said on either side.

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Instead, therefore, of again discussing this moot question, this court feel that it is their duty to follow what now appears at last to be the settled doctrine on the subject. In addition to the early case of *French v. McIlhenny*, A. D. 1809,* we have now *Schrivver v. Meyer*,† *Wood v. Hill*,‡ and *Shinn v. Holmes*,§ all concurring. The authorities are no longer *in equilibrio*. The question is settled, and should not be again disturbed. It will soon become obsolete under the wise legislation abolishing the old common law rule, which subverted the intention of the testator to subserve the policy of English institutions. The courts of Pennsylvania will of course adhere to the rule, as settled by their own highest tribunal.

* 2 Binney, 13.

† 19 Pennsylvania State,
87.

‡ Id. 513.

§ 25 Id. 142.

We are not disposed to encourage cases like the present. It is an easy thing under the transparent contrivance of a transfer to John Doe or John Smith (supposed to reside in another State), to bring every question of title to real property before the courts of the United States. This is the last of many cases, and I hope will continue to be the last, where titles decided in the State courts, after years of exhausting litigation, have been thus transferred and the litigation renewed, in the vain hope that the courts of the United States will assume to reverse the supposed errors of the State tribunals in questions of real property in dispute between their own citizens.

In such cases it is our duty to pronounce the law of Pennsylvania, as defined by her own Legislature and judiciary, and not to assume the position of umpire and pronounce the opinion of even the ablest minority of her judges entitled to more respect

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than that of the majority, and thus add to the confusion and uncertainty of titles. It would be a humiliating spectacle if this court should, under one rule of construction, deliver the land to the heir-at-law, who would probably be turned out of possession immediately by the devisee, in an action brought in another forum. Such would, I doubt not, be the result of a judgment for plaintiff in this case; and such a collision of judicial authority can only be avoided by the course now pursued.

Pease v. Peck, in the Supreme Court of the United States,* which enumerates certain instances as exceptions to the rule of adhering to State decisions, does not apply to the present.

* 18 Howard
598.

JUDGMENT ACCORDINGLY.

BAZIN v. THE STEAMSHIP COMPANY.

[CUSTOM: SEAWORTHINESS: DAMAGES.]

The practice of all the lines of steamships between Liverpool and America, for three years—the lines being two in number—to ship goods in a certain way, is not such a legal *custom* as will at all affect the terms of a contract in which any other way is specified, though such other way was always set forth in *all* contracts of the company, it having been the way as set forth in a printed form, and in practice constantly departed from. Nor, though conceded to be a practice well known to persons in Liverpool, would it be regarded in law as probably known elsewhere, *e. g.*, at Havre, nor, however, acted on by persons at Liverpool regarded as having been the implied basis of a contract, made at Havre by persons not from Liverpool, about a shipment to America, though from Liverpool.

The fact that a vessel runs in a fog, and in calm weather, upon a well known cape, is strong proof of her unseaworthiness, and not rebutted by the admitted fact that she was perfectly new, well built, well rigged and well manned, and in charge of a captain of reputed skill and experience. The conclusion remains that her compass had not been sufficiently tested, or that she was not well commanded, in fact, and for either of these wants she would be unseaworthy.

On a claim of damages for goods lost by a common carrier, the rule is that the carrier shall pay their net value at the place of delivery, with interest from the day when they should have arrived. Anticipated business profits are not allowed.

THIS was an appeal from a decree in the admiralty, in which a party claimed compensation from ship-owners for his goods lost at sea, while on their vessel. The case was thus:

Bazin, the libellant, was a retailer of French perfumery, in Philadelphia. Being in Paris in 1854, he purchased a large stock of goods for his business in America, which was shipped from Havre to Philadelphia. The respondents were the owners of a line of several steamships sailing between the ports of Liverpool and Philadelphia. For greater regularity and

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convenience of passengers and traders, the vessels sailed at regular intervals, from these ports; certain vessels being usually named for certain days, when it was convenient so to do; but there not having been, apparently, any contract with the public that special vessels should sail on special days. The steamship company had their agents stationed at *Havre*, authorized to receive goods meant to be sent from France to the United States, and to issue bills of lading. On the 28th of August, 1854, their agent at *Havre* gave the libellant a bill of lading, containing the following clause, viz.: "*Received in and upon the steamship called The Shamrock, now lying in the port of Havre, and bound for Liverpool, eighteen cases of merchandise; to be transhipped at Liverpool on board the Liverpool and Philadelphia steamship City of Manchester, or other steamship appointed to sail for Philadelphia, on Wednesday, the 6th day of September, and failing shipment by her, then by the first steamship sailing after that date, for Philadelphia; and are to be delivered in like good order and condition, at the aforesaid port of Philadelphia.*" The bill of lading was quite formal in several other specifications, as to the mode of landing the goods, &c., and contained exceptions against loss by "the act of God, the queen's enemies, pirates, restraints of princes and rulers, fire at sea or on shore, accidents from machinery, boilers, steam, or any other *accidents of the seas*, rivers and steam navigation, *of whatever nature or kind soever.*"

The respondents also owned, as one of their line, another steamship called *The City of Philadelphia*, which was appointed to sail *on the 30th of August, 1854*, for the port of Philadelphia. The libellant's

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eighteen cases by the *The Shamrock*, from Havre, arrived at Liverpool in time to put them on board of *The City of Philadelphia*, a week before the time that was provided for in the bill of lading, for a different vessel. The respondents accordingly shipped sixteen of them by *The City of Philadelphia*; the other two were afterwards shipped by *The City of Manchester*, on the 6th of September, 1854. *The City of Philadelphia* sailed on her first voyage, bound to Philadelphia, on the 30th of August, 1854, and on the 6th September struck the point of Cape Race, and was wrecked. Two of the cases on her were entirely lost, and the others much damaged; while the two cases not put on board her, arrived in *The City of Manchester* in due season, and in order.

The evidence as to the seaworthiness of the ship, and as to the cause of the disaster, was that of the captain, and as follows: "She was a new ship. I saw her in course of construction. She was built of iron, of the very best description; the character of the workmen stood very high on the Clyde; the naval constructors and workmen were of high character. She was, in every respect, a seaworthy vessel, at the time she started on her voyage. No expense was spared in fitting her up properly. She was well rigged and well manned; she continued seaworthy. *She struck the point of Cape Race*—up to that time she continued perfectly seaworthy. If she had not struck, at the average rate of our passage, we would have been in Philadelphia in five days more. The steamer was wrecked. We backed off the point of Cape Race, and run her on shore to save the lives of the passengers, and to keep her from sinking. *There was no tempest; she struck in a dense fog*—and the sinking of

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the vessel, and the damage done, resulted from her striking the cape."

No other account was given of the cause of the loss; and it was commonly supposed that the iron vessel had caused the needle to deflect; but this was not in proof. The vessel was between thirty and forty miles out of her proper course when she struck.

There was no proof, except as it was given by the bill of lading, that Bazin knew anything about the respective vessels, or that he had preferred one vessel rather than another. His libel, however, alleged that some time previous to the day of shipment, he had by letter directed his agent in France to send his goods by The City of Manchester, to sail from the port of Liverpool on the 6th day of September, 1854, *knowing her to be a safe and reliable steamship, and under skilful management*; and that, when in France, he had personally given the same orders, and made all his arrangements accordingly." The *answer* of the steamship company, stated that "the substantial and exclusive object of the contract, as understood between the parties, and as appears upon the face of the bill of lading, and as understood by the usages of trade, was to transport the eighteen cases of merchandise named therein, to Philadelphia, in the United States, in the *shortest time, and in the earliest steamer*, after the merchandise arrived from Havre." "The particular steamship," they answered, "which was to sail on the 6th of September, being named in the said bill of lading, was so named, inasmuch as the parties to the contract had reason to believe, from the usual facts which were incident to forwarding goods from Havre to Liverpool, that the *first* steamer to sail *after* the arrival of the merchandise would be The City of

Manchester." They alleged, "that had The City of Manchester, which was advertised to sail on the 6th of September, been for any cause unable to proceed upon her voyage, they would, either by some other vessel to sail on that day, or by the first vessel sailing after that day, have shipped the said cases direct to Philadelphia. But that the cases arriving from Havre in time for shipment by The City of Philadelphia, which sailed on the 30th of August; the respondents, in the diligent and faithful discharge of duty, desiring that the libellant should receive his goods in the shortest possible time, and in compliance with the customary mode of the particular business of the respondents, and settled usage of trade in this respect, shipped sixteen of said cases, safely and in good order, upon The City of Philadelphia, rather than permit the same to lose an entire week by remaining on deposit in Liverpool, for the sailing of the vessel appointed for the 6th of September."

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A witness was examined by the respondents, in order to confirm this view, and to prove a custom varying the obligation to comply with the terms of the bill of lading, and to show, that in forwarding the goods more expeditiously than they would have done by complying with those terms, they had acted in a usual and legal way, and one always desired by shippers. His testimony was thus: "According to the best of my knowledge and belief, there does exist at Liverpool, *a general usage, custom and practice*, amongst forwarding companies, as respects the time, order and manner of the shipment of goods sent to them, to be carried to the United States of America. Such general usage, custom and practice is, that the goods so sent for shipment, should be shipped to their

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place of destination with all dispatch, and, if possible, by the *first vessel of the company then next sailing*, in order to get the goods into the foreign market with every expedition, for the benefit and advantage of the shippers or consignees; I believe the British and North American Royal Mail Steam Packet Company, commonly called the Cunard Company, recognize and adopt this custom and usage, and I am not aware of there being any other British steam shipping company, having steamers for business purposes, between Liverpool and the United States of America. I am not aware of any other general rule, order, practice, usage or custom, other than what I have deposed to, which has existed ever since I have been in the employment of the company, about three years; it is not a secret practice, usage or custom, but, so far as I know, it is *generally known to the shippers* by the said steamship company's vessels. I first became aware of the fact that such custom existed at the time when I took charge of that department in the office of the company, which enabled me to have a knowledge of such custom by my intercourse with parties conducting business. I cannot state when this custom first arose, although I believe it has been of long standing, nor can I state, except as I have already done, amongst whom it prevails, nor whether it is subject to any, or what exceptions. I believe, and I have no doubt it is the fact, that shippers do frequently designate particular ships or vessels to carry their goods, but I say that I do not know, and I do not believe, that there is amongst shippers a preference sometimes for particular ships of the same line, or the masters commanding the same, and I have not known instances in which shippers have delayed sending goods by a par-

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ticular ship when there was full opportunity to do so, in order that they might go or be shipped by some other vessel sailing at a subsequent time, which they, for any reasons, preferred, except in such instances where several ships belonging to different parties are destined for the same port, to sail about the same time, and in those instances, I believe, a preference is given to a ship of the first class, in preference to a ship of a minor class, although the ship of the first class should be advertised to sail some days after the ship of the minor class; but in the case of this company, all their vessels are of the first class, and are all commanded by masters of reputed skill and experience, and no preference is made by shippers as to whether their goods are to be shipped by the one vessel or by the other, and in all instances, as far as I know and believe, the shippers expect and rely upon their goods being shipped by the first vessel, regardless of her name or of the name of her master."

Upon this case, the District Court decreed *pro forma*, in favor of the libellant, Bazin, for the original cost of the goods, adding expenses and cost of transportation, with seventy-five per cent., that being proved to be a fair sum or rate for "anticipated business profits."

Mr. *David Webster* and Mr. *H. M. Phillips* for the libellant, now made the following points:

For the
Libellant.

1. That the bill of lading formed an absolute contract to ship libellant's goods by The City of Manchester, sailing on the 6th of September, 1854; and that any shipment of them by the respondents prior

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to that time, was at their own risk, and in violation of the contract.

2. That no usage prevailing at Liverpool could vary an express contract, more especially one made at *Havre*, where no knowledge of such usage was shown to exist.

3. That assuming that the respondents had the right to ship by The City of Philadelphia, they were nevertheless liable, since they had failed to show that she was lost through any of the perils excepted in the bill of lading.

4. That the measure of the libellant's damages was the market value of goods here, at the time they should have been delivered, in estimating which there was to be added to the original cost, not only duties and charges, but an allowance for the advance in value which they acquired in the market, the moment they were in condition to be sold, whether called profits, or by any other name.

For the
Respondent.

On the part of the respondents, Mr. *James Murray Rush* contended:

1. That the receipt for the goods given in *Havre*, was not a maritime contract, but only an engagement preliminary to a maritime contract, and therefore not within the admiralty jurisdiction of the District Court.

2. That the respondents were not bound to *detain* the goods in Liverpool to await the sailing of The City of Manchester, but under the law, as well as from usage, it was their right, as well as duty, to send them forward by The City of Philadelphia.

3. That anticipated profits could not be recovered, but only market value, or the amount it would take to replace the goods.

GRIER, J. The objection of the respondent's counsel, that the contract is not a maritime contract, cannot be supported. The case presents a bill of lading by which defendants bind themselves to carry goods received at Havre, and deliver them in Philadelphia. It is a contract for a maritime service, and it would be difficult to say what is a maritime contract if it be not one. If it had been merely an agreement by respondents with libellant, that if he would send goods by their line, they would receive and forward them for a certain consideration, and the breach of the agreement was in refusing to receive or transport the libellant's goods at all, or for the consideration stipulated, then this first objection of the respondents would apply. But when the respondents have received the goods on board their vessel, and given a bill of lading to transport them across the ocean, it can hardly be called a preliminary agreement to a maritime contract, and not the contract itself.

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The case then presents these two questions on the merits.

1st. Are respondents liable?

2d. If so, what is the rule of damages, and how is their amount to be ascertained?

The reason given by the answer why The City of Manchester was named in the contract, may possibly have been the true one, or that assigned by the libel, to wit, that the libellant "directed his agent in France to send his goods by The City of Manchester," which was advertised to sail on the 6th of September, because he knew her to be a safe and reliable vessel, and under skilful management. But we need not search for any reason, "*Stet pro ratione voluntas.*" The libellant may, in fact, have had no better reason than that he

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believed The City of Manchester to be a *lucky vessel*, or he may very justly have preferred a tried boat and crew to a new iron steamer, whose officer or whose compass had not been tested by a trip across the ocean. Reason or no reason, he had a right to have his contract fulfilled according to its stipulations, and the result has shown that if such had been the case, his goods would have arrived safely. If the goods had been sent by the Manchester, the risks accepted in the bill of lading would have been borne by the libellant. For them he was his own insurer, and the carrier of those not accepted. If the carrier changes the vessel and the time of dispatching the goods, he has substituted different risks from those stipulated by the parties, and should be held as insurer against, all loss from whatsoever cause. The loss to libellant is a result of defendant's breach of contract.

But, assuming that the libellant had no good reason for desiring his goods to be sent by a particular vessel, and that the insertion of the name of The City of Manchester was merely *pro forma*, to fill up the usual blanks in a printed bill of lading, is there any evidence whatever that the goods were not injured in consequence of any accident accepted in the bill of lading?

The respondents aver that the ship was seaworthy in every way; the libellant denies the fact in his replication. The testimony of the captain shows his steamboat to have been *new*, made of iron, tight and stanch, well rigged and manned. The only account given of the loss of the vessel, was as follows: "She struck the point of Cape Race; up to that time she continued perfectly seaworthy. If she had not struck, at the average of our rate, we should have been in Philadelphia in five days. The steamer was wrecked.

We backed off the point of Cape Race and run her on shore to save the lives of the passengers, and to keep her from sinking. There was no tempest. She struck in a dense fog; the sinking of the vessel and the damage done, resulted from her striking the cape.”

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Here, then, we have no other reason given by the captain, nor any testimony whatever, as to how or why this great mistake of running against a cape occurred. The answer and the witness *both seem* to assume that running against a cape or a continent is one of the usual accidents and unavoidable dangers of the sea. That cannot be termed an “*accident of the sea*” within the exceptions of the bill of lading, which proper foresight and skill in the commanding officer might have avoided. If the compass on the new iron vessel was not sufficiently protected to traverse correctly, the vessel was as little seaworthy as if she had no compass—and this should have been carefully ascertained before she started on her voyage. If there was no fault in the compass, then it is very evident that the officer who is thirty or forty miles wrong in his calculation, and driving through a thick fog with a full head of steam, and first discovers his true position by running on an island, a cape, or a continent, has neither the skill nor the prudence to be entrusted with such a command—and for want of such an officer the vessel is not seaworthy.

The loss of the goods committed to a carrier, and in possession of his servants, puts the burthen of proof on him, to show how it took place, and that it was not by their fault, but in consequence of some of the unavoidable accidents excepted in the bill of lading.

The respondents have not alleged or proved any one fact tending to relieve them from responsibility.

APPEALS, 1857.

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That a steamboat has been either ignorantly, carelessly or recklessly dashed against a cape in a thick fog, cannot be received as a plea to discharge the carrier. Yet for anything that appears—such is the case before us. If there were any circumstances tending to lead to a contrary conclusion, they are not in evidence in the case.

II. The rule of damages in these cases is, that the carrier shall pay for goods not delivered, their net value at the port of delivery. He is not liable for any speculation or possible profits which the owner might have anticipated in his peculiar business. Thus, suppose the carrier liable for non-delivery of a hundred barrels of flour at Philadelphia on a given day, and on that day flour is worth five dollars a barrel, the amount of the owner's damage is clearly just \$500, because he could have bought a hundred barrels of flour and supplied his loss for \$500. The owner cannot be allowed to show that he was a baker and could in a few weeks have cleared ten dollars a barrel by manufacturing his flour into bread. The sum of money which represented the net value of the lost articles, with interest till paid, is all that can be recovered from the carrier when goods have been lost in the course of transportation. And as the owner would have paid freight as a deduction from the net value of his flour, so when the carrier pays its value, he will be entitled to have his freight deducted, if it has not been paid.

In all cases when the article to be delivered has a definite market value, the application of the rule is without any difficulty.

The libellant keeps a variety store in Philadelphia. The eighteen cases contained a selection of ten thou-

sand articles of perfumery, &c., &c., to be found only in such shops. They are retailed generally at one hundred per cent. profit on the original cost in Paris. But few if any of these numerous trifles have any known wholesale or market value in Philadelphia, nor could libellant have supplied himself with the lost goods most probably in the Philadelphia market at any reasonable price. How, then, are we to arrive at a rule of damages to ascertain the amount of loss to libellant for the non-delivery of his articles? Certainly not as contended by his counsel, by taking the original cost, adding expenses and charges of transportation, and seventy-five per cent. "for loss of anticipated profits."

AP'L SESSIONS,
1857.THE COURT'S
OPINION.

If these articles, like most other goods and wares, had a known value in market here, for which they could be purchased, the original cost and charges of transportation would have nothing to do with the calculation. But as such is not the case in the present instance, we must inquire what was the original cost and what the charges of transportation, &c, in order to arrive at their value here; or more properly, what would it cost to get other goods of precisely the same value in place of those lost. Now, we may assume (as nothing is pretended to the contrary) that a bill for the very same sort of articles which Bazin has purchased could be filled in Paris for the same sum of money. In less than sixty days, every article not delivered here by the carrier, could be put in Bazin's shop, for the same price which he has paid for them. But he will have lost only the interest of his money for sixty days longer. How much profit he might have made by retailing them, or what the amount of "*anticipated business profits*," being matters not capa-

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ble of certain ascertainment, cannot make a part of the consideration. Legal interest is all that the law knows as the damage for detention of money. As the goods lost, therefore, have no market value here, and could not be purchased in our market, their value must be ascertained by adding costs and charges, and sixty days' interest on this sum. From this amount deduct freight, which is unpaid, and add interest on the balance till judgment.

If counsel can agree upon the amount of damages calculated on these principles, the decree will be entered for such amount; if not, the case will be referred to a master to report.

FOX v. THE RAILROAD.

[EFFECT OF AGREEMENT TO SUBMIT TO PRIVATE AWARD.]

If parties, in making a contract under which disputes are contemplated as possible, agree under seal to submit any such disputes to private arbitration, as *e. g.*, to the award of some third person, so that his decision shall be final and conclusive on them both, it is a bar to any action on the contract that the plaintiff does not either aver and prove such award, nor aver and prove such facts as excuse it.

THE plaintiff—a contractor on the Hempfield Railroad—declared in an action of covenant, on an article of agreement made by him with that railroad company, the present defendant, for the construction of a section of the road. He averred that he commenced the work according to contract and continued to prosecute the same, and was ready and willing to have completed it, but was hindered and prevented by the defendant from prosecuting and completing the work, and was thereby deprived of his reasonable gains and profits that would have accrued to him, to the amount of \$50,000. He averred also that the defendants have not paid him for work which he did, the sum of \$25,000.

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1857.
STATEMENT.

The defendants cravedoyer of the article of agreement, which on being read showed the following clause in them :

“ And it is mutually agreed and distinctly understood that *the decision of the chief engineer* for the time being, shall be *final and conclusive in any dispute which may arise between the parties of this agreement relative to or touching the same* ; and each and every

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1857.

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of said parties do hereby *waive any right of action*, suit or suits, or other remedy in law or otherwise, by virtue of said covenant; so that the decision of the engineer shall, in the nature of an award, be final and conclusive on the right and claims of the said parties; and the said engineer being a stockholder of this company shall be no objection to his exercising the trusts and power herein granted to him."

The plea averred that the supposed breaches of covenant, wrongs and injuries of which the plaintiff complained, *had not been submitted to the decision of the engineer*, and that the defendants have always been and still are ready and willing to submit all controversies and disputes between them and the plaintiff relative to and touching said agreement, to the final and conclusive decision of said engineer.

A demurrer to this plea raised the question, which was now before the court for decision, *st.*, *Can the plaintiff sustain this action without averring and proving an award by the engineer on the matters in dispute, between the parties, or excusing the want of it by averment and proof that it was out of his power to obtain such an award?*

The case was argued by Mr. *Shaler*, for the plaintiff, and by Mr. *Hamilton* and others, for the defendant.

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GRIER, J. The meaning of this clause cannot be doubted, notwithstanding its rather awkward expression. The parties agree that in case any matter arise between them concerning any matter connected with their agreement, instead of resorting to the legal tribunals for their settlement, they will submit the same to the decision of the engineer, whose award shall be final and conclusive.

If the plaintiff had averred that the matters in dispute had been submitted to the arbitrator, and that he had awarded the sum of \$50,000 as damages, there is no doubt he could support an action on the award, if the defendant had refused to perform it. Such contracts to submit anticipated disputes on any subjects to an arbitrator whose award should be conclusive, have sometimes been held void, for the reason (if reason it can be called) that it was an attempt to oust the supreme courts of their jurisdiction. In *Scott v. Arey*,* the Court of Exchequer ruled a plea like the present, bad, for this reason. The Exchequer Chamber reversing this judgment held, that although an agreement which ousts superior courts of their jurisdiction is illegal and void, yet as the contract did not deprive the party of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained by the arbitrator, it bound the parties. This latter judgment has now been affirmed by the House of Lords on the advice of four to three learned judges, and sanctioned by the recommendation of the Lord Chancellor, and Lords Campbell and Brougham.

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OPINION.

* 8 Exchequer, 487.

The result appears to be: First, that a condition in a contract that the sum recoverable on a breach shall be ascertained by arbitrators before the parties shall sue, either at law or at equity, is not such an agreement as will be treated as invalid, or as an attempt to oust the courts of their jurisdiction; and Secondly, that it is even doubtful whether there is any sufficient foundation, either in policy or principle, for the ancient and hitherto undoubted doctrine that parties cannot bind themselves by contract not to resort to the courts of law or equity. Lord Campbell stated thus em-

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phatically his view of the main question in dispute:—

“There is an express undertaking that no action shall be brought until the arbitrators have decided. There is abundant consideration for that in the mutual contract into which the parties have entered. Therefore, unless there be some illegality in the contract, the courts are bound to give it effect. There is no statute against such a contract. Then on what ground is it to be declared illegal? It is contended that it is contrary to public policy. That is rather a dangerous ground to go upon. What pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract.” And his lordship subsequently traced with much disapprobation the origin of the opposite principle, which he attributed to the endless competition of the courts, and their desire to absorb litigation into their respective jurisdictions.

This obsolete dogma does not appear to have been received with approbation in Pennsylvania. In the case of *The Monongahela Navigation Co. v. Fenton*,* it was decided that “if the parties to an executory contract make a provision in it that any dispute, which shall arise between them on the subject of the contract, shall be determined by an individual named, whose decision shall be final, no action will lie for a breach of the agreement by one against the other, but they must resort to the tribunal appointed by them-

* 4 Watts & Sergeant, 205.

selves, from whose award there is no appeal." That case governs the present, as to every dispute arising "relative to or touching the agreement" declared on.

MAY SESSIONS,
1857.

THE COURT'S
OPINION.

Such a clause in contracts like those constantly made by corporations for great public improvements, is absolutely necessary to prevent the corporations from being ruined by endless litigation. It should be liberally construed and not subjected to ingenious criticism in order to support the jurisdiction of courts of law and encourage litigation.

The defendant is entitled to judgment on the demurrer.

[AT PITTSBURG.]

ALLEN v. ALLEN'S EXECUTOR.

[JURISDICTION: ORPHANS' COURT OF PENNSYLVANIA.]

The fact that by the laws and customs of Pennsylvania, the Orphans' Court of the county, as a special court of equity, has jurisdiction of the accounts of executors, &c., is no bar to the Federal courts exercising jurisdiction over exactly the same subjects;—other things allowing, and the Orphans' Court not having at the time actual possession of the case or parties.

MAY SESSIONS,
1857.

STATEMENT.

THIS was a suit in equity at Pittsburg, Allegheny county, in which the complainants set forth by their bill that one Allen, of that county, the testator of the defendants, being owner of a large real and personal estate, died, having made by his last will certain annuities, bequests and devises, some out and out, and several in trust. Then averring themselves to be interested under the will, and showing that they were on the grounds of alienage, &c., entitled to sue in the Federal courts, they prayed that the rights of themselves and all parties might be ascertained and declared by a *decree of this court*; that an account of the personalty might be taken under the direction of *this court*; that after payment of debts, &c., the residue of the assets might be marshalled and applied to the exoneration of the real estate from the annuities; or if insufficient so to do, to do relief so far as it would go; praying further, a discovery of the personal assets, and how they had been applied, and whether the defendants meant to charge the realty with the payment of the annuities.

To this part of the bill there was a plea, that "*this court* has no jurisdiction over the matters and things,

&c., because the same are by the *laws and customs* of Pennsylvania within the *exclusive* cognizance of the *Orphans' Court of Allegheny county*, and are impleadable and ought to have been impleaded in the said court, &c., *and not elsewhere*; the said court being the *only proper jurisdiction*, and being, moreover, competent to administer a complete and adequate remedy in the premises." The plea did not allege the pendency in that court of any litigation between the parties on the same subject matter.

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1857.
STATEMENT.

The question, therefore, now before this court was the sufficiency of the plea: a point on which, after arguments by Mr. *Shaler* and Mr. *Loomis*, for the complainant, and by Mr. *Williams*, for the respondent, the court's opinion was thus given by

GRIER J. It is not disputed that the plaintiffs have a right under the Constitution and laws of the United States to come into this court for relief, nor that the relief sought is such as a court of equity administers; but it is alleged that by the law of Pennsylvania, the Orphans' Court having exclusive cognizance of these matters, the defendant could not be impleaded, except before the judge of that court.

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OPINION.

This is no doubt true as between the various courts of Pennsylvania. Their courts of common law jurisdiction, whether criminal or civil, could not give the remedy sought for in this bill, for the reason that a special court has been constituted with chancery powers, having jurisdiction of the accounts of executors and administrators, the care of the persons of orphans, power to order the sale of the real estate of a deceased person, to pay his debts, and many other matters.

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But it by no means follows that by such a distribution of the judicial powers of the State courts, that the courts of the United States can be ousted of the jurisdiction conferred on them by the Constitution and laws. The Court of Common Pleas is the only one that can give a remedy by action of ejectment or debt, but it does not follow that because no other court in Pennsylvania can give such a remedy and the jurisdiction of the Common Pleas is consequently exclusive on the subjects, that foreigners and citizens of the other States of the Union may not have their remedy in courts of the United States. A party who has a right to sue in the courts of the United States cannot be divested of that right by the laws of any State. The relief sought by this bill is within the well established boundaries of the jurisdiction of a court of chancery. No other court has obtained possession of the subject matter or the parties. The action of this court cannot effect in any way the settlement of any amount by the executors in the Orphans' Court. It will produce no conflict of jurisdiction. In the case of *Aspden's Estate*,* which we decided in 1853 at Philadelphia, the Orphans' Court of that city settled the account of the executors whom Aspden had appointed, then removed them and appointed others, and had the whole care of the personal estate, while the various claimants under the will were contesting their rights in the court of the United States for twenty years. When money was ordered by the Circuit Court to be paid out of the fund by the executor, such order was a sufficient voucher for his settlement in the Orphans' Court; while the Circuit Court held the parties concluded as to amount and credits by the accounts settled in the Orphans' Court.

* 2 Wallace, Jr., 368; and see 1 Id. 217.

The Orphans' Court of Pennsylvania is a court of chancery of limited jurisdiction, and is no more exclusive of the United States courts than is any other court in the State. There will be no necessary conflict of jurisdiction; and the plaintiff has an undoubted right to the relief prayed for in this bill.

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1857.
THE COURT'S
OPINION.

The plea to the jurisdiction is, therefore, overruled, and the clerk of this court is appointed master to state an account as prayed for in the bill, and the decision of other questions suspended till the coming in of the account.

[AT PITTSBURG.]

MASON ET AL. V. THE BOOM COMPANY.

[CONSTRUCTION OF STATUTES: FEDERAL AND STATE RIGHTS.]

Although it is a settled rule of law, that when a proviso to a grant of any kind is repugnant to the grant itself, the grant is good and the proviso only void, yet this is a rule which is to be taken with modifications. And in the construction, especially of American statutory grants in derogation of common right, passed as private acts, oftentimes are in our Legislatures inconsiderately, and after having been ingeniously drawn beforehand, by persons who had a special and not allowable interest of their own in view, and who have contrived language to carry their object, in such a way that the Legislature less acquainted than they with exact facts, could not discover the precise import of the words used, the rule is always to be taken in subordination to the greater rule of law, that the true intention, as apparent from the whole grant, is to be effectuated.

Hence, if on a whole case, reference being largely had to the public interests, in determining this point, it appears that a grant meant to give rights in case those rights could be enjoyed in a certain way, in which way it is plain, after experiment, that they cannot be enjoyed, then the whole grant is void. And in such case it makes no difference whether the qualification to the grant be put in adjectitiously and after an absolute previous grant, or whether it be put in previously and as a condition precedent.

No State of the Federal Union, by declaring, in a grant which it makes of certain rights, that any question which arises under that grant, shall be determined in such or such a way, can prevent any class of citizens from suing in the Federal courts, if, by the Constitution and statutes of the United States, they have a right to sue in such courts.

Semble, That the Pennsylvania statute of 1806, which enacts that in "all cases where a remedy is provided or duty enforced, or anything directed to be done by an act or acts of Assembly of this Commonwealth, the directions of the said act shall be *strictly* pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the *common law*, in such cases, further than shall be necessary for carrying such acts into effect," has reference to *legal* remedies only, and having been passed, when the equitable remedy of injunction was unknown in Pennsylvania, does not enjoin injunction.

SEP. SESSIONS,
1858.

STATEMENT.

THIS was a bill for injunction against stopping the complainants' lumber while it was floating down the Susquehanna; the case being thus:

A statute of Pennsylvania* made certain persons a corporation, under the name of The West Branch Boom Company, and authorized them to erect at a certain point on the Susquehanna, (a public highway of Pennsylvania,) such boom as might "be necessary for stopping and securing" lumber floating upon that river; giving them tollage; with a *proviso* that the boom should not extend more than half way across the river, and be so constructed as to admit the safe passage of rafts, boats and lumber, and not impede the navigation of the river. A second *proviso* not very consistent with the general scope of the law, enacted, that no lumber should be stopped without a written request from the owner, and that "a free and unobstructed passage shall at all times be kept open, so that the navigation shall be as free as it is now;" *i. e.*, before the boom was constructed. It then provided that if any persons should "suffer damage by the exercise of the powers herein granted," and the parties injured and the Boom Company could not agree on the damages, "the Court of Common Pleas having jurisdiction in the county where the boom is," should cause them to be ascertained by three freeholders, whom the court should appoint; and *their* report being confirmed, should have the effect of a judgment: with a right of appeal to a jury.

A previous well known general statute of Pennsylvania, passed in 1806,† it is here necessary to say, enacts that in "all cases where a remedy is provided or duty enforced, or anything directed to be done by an act or acts of Assembly of this commonwealth, the directions of the said act shall be *strictly pursued*, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such

SEP. SESSIONS,
1858.

STATEMENT.

* Act of 29
March, 1849.

† Act of 21
March, § 2.

SEN. SESSIONS, 1858. *cases, further than shall be necessary for carrying such acts into effect."*

STATEMENT.

In this state of the law, the complainants, who were citizens of Rhode Island and Connecticut, were floating rafts down the Susquehanna, which got into the boom of the defendants, and were detained there several weeks; and having filed their bill as above stated against the defendants, praying that they might be enjoined from stopping it, the case came on to be heard on this bill and the answer to it.

The answer did not deny that the logs were detained, nor that the complainants might be damnified by such detention, but it alleged that the defendants could not help what occurred; that they were doing their best to prevent all unnecessary detention; that their boom was constructed in the best manner, and according to their act of incorporation, and that if any detention occurred, not authorized, it was unavoidable, and an incident to the lawful exercise of their franchise: *damnum absque injuriâ*. It submitted, impliedly, that the power to make a boom of specific dimensions, which dimensions were here complied with, was clearly and primarily given; and if the law, subsequently, and by way of *proviso*, declared that in making the boom, impossibilities should be accomplished—that is to say—if it declared (which it seemed to do) that while the boom came one-half across the river, the navigation should be just as absolutely unobstructed as if there was no boom there at all—such a *proviso* it was—a proviso which provided for a physical impossibility, and for a thing inconsistent with and repugnant to the main object of the grant—which was void, and not the enacting clause which expressed the *chief scope* of the act, viz.: the

power to build the boom. It then opposed to the prayer for an injunction, these objections:

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I. That the rivers of Pennsylvania, though highways for its citizens, were not necessarily so for the citizens of other States.

II. That the act authorizing the boom prescribed the manner in which any one aggrieved should get satisfaction, and the more ancient, well known and general statute of 1806, declared that in such a case no *other* remedy could be had.

After argument by Messrs. *Armstrong* and *Maynard* for the complainants, and by Mr. *Linn* for the Boom Company, the opinion was given by

GRIER, J. The objection that the river is made a highway only for *citizens of Pennsylvania*, and that the complainants claim rights as Pennsylvanians, while they deny their character as citizens, is answered by that article of the Constitution of the United States which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The complainants have a right to hold land in Pennsylvania, to erect mills and use the public highways by land or water, as freely as citizens of Pennsylvania, and have, moreover, a right to sue a citizen of Pennsylvania, or a corporation, the members of which are presumed to be citizens of Pennsylvania, in this court.

THE COURT'S
OPINION.

To the second objection—that one founded on the specific remedy given by the act of incorporation and and the general Pennsylvania statute of 1806—there are several answers, each of which is conclusive.

I. The Legislature of a State cannot take away the

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OPINION.

privilege conferred by the constitutional laws of the Union upon citizens of other States, to sue in the courts of the United States, by enacting a special remedy in their own county courts.

II. It has never been decided that the act of 1806 has reference to any other than *legal* remedies and penalties. At the time that act was passed the equitable remedy by injunction was unknown, or at least not in use in Pennsylvania.

III. The act of incorporation gives the special remedy only in cases where persons suffer damages "*by the exercise of the powers granted to the corporation;*" whereas the complainants charge that they have been injured by an exercise of powers *not granted* to the corporation. If this were a case where complainants' land was taken, or the water diverted from or turned upon it, or any other injury, direct or indirect, caused by the legitimate exercise by the defendants of the powers granted in their act of incorporation, the remedy provided by the act might have been pursued. But has no application to the present case; and more especially so, as the bill does not demand the removal of the boom as a nuisance, but only an injunction against the exercise of powers not granted by law to the corporation.

The only question, then, that remains, is whether the company have a right to stop the logs of the plaintiffs, and detain them for weeks from passing down the river, without their consent. Confused and contradictory as the language of the statute is, we need not grope for its meaning through its various sections. This much, however, we may assert as quite plain: That when the Legislature granted this franchise to the defendants, it was on the representa-

tion of the grantees, and the understanding of all concerned, that a boom could be kept up, which would not necessarily infringe the public right of navigation. It is a condition of the grant, that the corporation shall not detain the logs of those who do not wish it: the company have no power to do so, and in accepting the franchise and acting under it, they have admitted their ability to exercise their powers without injury to the rights of others.

SEP. SESSIONS,
1858.

THE COURT'S
OPINION.

The assertion involved in the answer that it is impossible to construct the boom which is authorized, so as to separate the logs and give those a free passage which they have no right to detain, amounts to a confession that their boom is a nuisance. If they *cannot* so construct it as to detain only the logs of those who request this duty of them, and not detain the property of those who do not, they have a franchise which, by their own showing, is impossible to be exercised. They must take it with its burthens as well as its benefits, or not take it at all. It would be a strange construction of their franchise, which would permit them to exercise prohibited powers, because convenient for the exercise of those granted.

INJUNCTION DECREED.

[AT WILLIAMSPORT.]

EX PARTE TURNER.

[REMOVAL FROM STATE COURTS TO FEDERAL: MANDAMUS FOR
REMOVAL.]

In ejectment, under the now usual American form, in which the fictitious lease, &c., is abolished,—where the tenant in possession, who *has* been served as defendant, does *not* fall within the description of persons authorized to remove a case from the State courts to the Federal, but the landlord who has *not* been made a party *does* so fall, such landlord cannot by any means that, under existing laws, can be devised, remove the case from the State court into the Federal. He can get into the suit at all only by appearing voluntarily and taking defence, and when he does this he connects himself inseparably with his incapable tenant, and becomes, himself, incapable. The tenant in possession being, if sued and served, a proper and necessary party, the landlord by appearing and taking defence (which he may do and become *dominus litis*), cannot yet have this tenant struck off the record, and so, being now alone, exercise the right which if he had been, originally, the only defendant, he might have exercised: nor yet can he sever himself from his tenant, leaving the tenant still on the record and in State jurisdiction, while he, the landlord, comes himself and has the title tried in a Federal court.

If tenants in common, some of whom belong to a State in which the suit is brought, while others do not so belong, sue a party who does not so belong, such defendant it seems, cannot remove the case at all. He cannot remove it for the whole land sued for, because *EACH* of the parties suing is not a citizen of the State in which the suit is brought; and he cannot remove it for the parts claimed by those of the plaintiffs who are such citizens, because the Federal court will not thus divide an action, not yet before it, into parts, for the sake of obtaining jurisdiction over one of them, nor can its process be so framed as to order a State court to send in to the Federal court, a *fraction* only of a cause pending on the lists.

Whether a mandamus may issue from the Circuit Court to the State courts to *compel* it to send a cause from its jurisdiction into the Federal? the point raised but not decided. No objection to such power, however, being taken at the bar.

OCT. SESSIONS,
1858.
STATEMENT.

A NUMBER of persons, citizens of Connecticut, New York, Ohio and *New Jersey*, claiming undivided portions of a tract of land in the last named State, had brought ejectment against *Boylan* in a State court of

New Jersey. The suit was not in the old English and fictitious form, but in the way now allowed in several States, including New Jersey, by which a writ in the name of the real plaintiff is issued against the person in possession, and the land being described with more or less precision, is claimed by the party who pretends to own it.

OCT. SESSIONS,
1858.
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Turner, a citizen of Ohio, who asserted ownership of the land in himself and against the parties claiming it as plaintiffs, applied to the State court of New Jersey to be admitted to defend as landlord, showing that Boylan held under a lease from him; and alleging that this Boylan refused to defend the suit. He prayed leave, also, to be allowed to defend "*separately*," and that the cause might be removed under the 12th section of the judiciary act of 1789, to the Circuit Court of the United States, "so far as regards the parts claimed by such of the plaintiffs as are citizens of New Jersey." The State court granted him leave to appear and defend, but not "*separately*;" and refused to certify the case or any portion thereof to this court.

On a motion now made by *Turner* for a mandamus to the State court to remove the action here, the question was whether, under the circumstances stated, it was the duty of that court to order a removal. The question depended on the 12th section of the act above mentioned, which enacts, "that if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State," it may be removed into the Circuit Court of the United States.

GRIER, J. The power of this court to issue a man-

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damus to a State court, where it has refused to certify a case under the 12th section of the judiciary act, has not here, before us, been questioned. But as such process is not specially authorized by that act, and as I am not aware of any authoritative decision of any court of the United States on the subject, I need neither affirm nor deny the power of the court to issue it.

Although the Legislature of New Jersey has demolished the scaffolding of fictions formerly used by it in actions of ejectment, and has simplified the process and pleadings, this has not changed any of the principles of law which govern the action. The lessor of the imaginary plaintiff under the old form, is made the formal party plaintiff, and the tenant in possession is now served directly with process claiming the possession of the premises in question, instead of receiving notice from the fictitious casual ejector, and a copy of the declaration. As before, the lessor or reversioner under whom the tenant in possession claims title, is permitted to make himself a party, and assume the defence of their common title. But though he may thus practically become the *dominus litis*, it is still but as a co-defendant. The tenant in possession is still a necessary party to the action. He is the actual trespasser of whom the plaintiff demands damages and judgment for the possession; the landlord cannot surrender his tenant's rights, nor can the tenant collude with the plaintiff to oust his landlord. Neither can the refusal of the tenant to make a defence affect the case, and justify the court in expunging his name from the record without the consent of the plaintiff. The landlord may enter a plea for him and defend his title, but cannot sever him from the suit. If the

plaintiff should recover, he is entitled to have a judgment and writ of possession against the tenant in possession. The tenant is therefore a proper and necessary party in an ejectment; not a naked trustee; not the nominal, casual ejector, but the actual party in possession, who cannot withdraw from the suit without consent both of the plaintiff and his co-defendant. If he be an alien, or a citizen of a different State, he may exercise his right to remove the case, under the judiciary act, to the Circuit Court of the United States, before his landlord becomes co-defendant. The fact that his lessor or landlord may be a citizen of the same State, cannot affect the tenant's right to remove if such landlord be not made a party co-defendant on the record. The lessor or reversioner has a right to have himself made a co-defendant, but it is not his duty. He may defend the suit for his tenant, with his tenant's consent, without putting his name on the record. He is not a necessary party, nor can the plaintiff make him such without his consent, by including him in his writ, where he is not in actual possession of the land claimed.

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This ejectment having been instituted by a number of tenants in common, claiming undivided portions of the land, they might, under the old form, have made their several leases to John Doe, and in his name have recovered possession of the whole, or of such undivided part thereof as they had shown title to. Under the new form, these tenants in common may join, and each recover according to his title. The plaintiffs are citizens of four different States, but Boylan, against whom this suit was "commenced," is a citizen of New Jersey. He sustains neither of the characters required by the act to give this court jurisdiction—he is neither

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an "alien" nor a citizen of *another* State *sued* by a citizen of New Jersey. As we have shown, he is the proper and necessary party defendant in the suit of ejectment. Turner, the landlord, is permitted by the grace of the court and the law, to become a co-defendant, and defend the title for Boylan and himself. If Boylan (the tenant) will not defend, the plaintiff might be entitled to judgment against him, and a writ of possession. But, as we have said, the court will not permit him, either to get off the record as a party, or thus to trifle with the possession which he is bound to retain for his landlord. Turner may enter the plea of "not guilty" for both, and contest the plaintiff's claim: but not being able to sever himself from his co-defendant, who is in possession, he cannot remove the case to this court, with or without the consent of Boylan. *Beardsley v. Forrey** is in point.

* 4 Washington's Circuit Court Reports, 286; and see *Ex parte Girard*, *post*, 263.

Objection also exists in the co-tenancy of the plaintiffs, though some are of New Jersey, even if we should assume Turner, who is of Ohio, to be the sole party defendant, and Boylan but a nominal or formal party, against whom no judgment or decree is sought. Tenants in common may join in one action; and whatever may be the power of the court below to compel them to sever, for sufficient cause shown, a power about which I speak affirmatively in the next case,† I can find no authority for this court to divide an action *not yet before it*, into parts, *for the sake of obtaining jurisdiction over one of them*, nor do I know how it could command the court to send us up a fraction of a cause pending on its lists.

† *Ex parte Girard*, *post*.

MANDAMUS REFUSED.

[AT TRENTON.]

EX PARTE GIRARD.

[REMOVAL FROM THE STATE COURTS INTO THE FEDERAL.]

To be able to remove a case from the State courts to the Federal, under the 12th section of the judiciary act of 1789, each defendant—no matter how numerous the defendants may be—who have been properly served with process, or who voluntarily appear without having been so served—must be either an alien or a citizen of a State other than that of the State to which the plaintiff belongs. It is not enough that one defendant, or any—the largest number short of the whole—be so.

If one defendant be an alien and be properly served or be otherwise in court, and other persons, not aliens or citizens of a State or States other than that to which the plaintiff belongs, be named as defendants in the writ, but be not served, nor appear voluntarily, the alien defendant who is served, may himself remove the case. Per GRIER, J.

Where a plaintiff brings ejectment against several persons who hold by several and distinct titles, no doubt the court in which such process is issued may compel such plaintiff to discontinue and divide his action; and will not permit him by joining defendants thus claiming, to affect injuriously the rights of any.

THE city of Philadelphia had brought ejectment in a State court of Pennsylvania against J. F. Girard and eleven other persons. The writ was served on J. F. Girard alone, he having been the only one of the twelve named in the writ who was in actual possession. The eleven persons not served appeared voluntarily to the action, and then the whole twelve petitioned the State court, as under the twelfth section of the judiciary act of 1789, that the case might be removed thence into this court. The petition for removal *did not aver that each one of the twelve was either an alien or a citizen of some State other than Pennsylvania*; though it did make one or the other of these averments with regard to eight of them;

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J. F. Girard, however, the defendant in possession,
not being one of them.

A motion was now made by Mr. *Olmstead* for the city to remand the case for want of the requisite averments in the petition to the State court; a copy of which, as the judiciary act directs, had been filed here.

The words of the section of the act on which the motion depended are thus:

"If a suit be commenced in any State court against *an alien*, or by a citizen of the State in which the suit is brought against a citizen of another State, . . . and the defendant shall . . . file a petition for the removal of the cause for trial into the next Circuit Court to be held in the district where the suit is pending . . . it shall then be the duty of the State court to accept the surety and proceed no further in the cause, . . . and being entered as aforesaid in such court of the United States, the cause shall there proceed, &c."

It was argued by the counsel of the twelve defendants, that if there was "*an alien*," that is to say, one alien in the case, or "*a citizen*" of another State—that is to say, a single citizen—this was enough.

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GRIER, J. If J. F. Girard be an alien, he would have had the right to remove the case under the act of Congress to this court, for the plaintiff cannot, by inserting the names of persons not in actual possession, affect the right of the tenant in possession, who may call in his landlord to defend his possession at his own option. His landlord may, also, at his own election, apply to the court, and be made a co-defendant. But the plaintiff has no right to assume that any other person except the one in possession, claims a right in the land. The defendants may all be owners, and J. F. Girard, the tenant in possession, may be their

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lessee or tenant. But persons resident elsewhere than in the State where the land lies, cannot be made parties to an action of ejectment in that State, except by their own consent and that of the defendant in possession. The parties not served with process here, appeared voluntarily to the action, and have thus made themselves parties defendant, and admit themselves in possession, and to be proper parties. They all join in the petition for removal, but they do not aver that J. F. Girard, on whom the writ was served, and three others of their number are—in addition to the eight remaining, of whom it is averred—either aliens or citizens of any other State. *Beardsley v. Forrey** decides that when the tenant in possession is a citizen of Pennsylvania, and his landlord, a citizen of another State, is admitted to defend, the case is not within the provisions of the 12th section of the judiciary act, and cannot be removed to this court. And in *Ex parte Turner*, supra, p. 258, just decided, the same decision has been made after full argument, and a careful consideration of the question. But although the plaintiff could not, by serving his writ on persons not in possession, affect the rights of the tenant in possession to remove the case if *he* had been an alien, yet if the other defendants—some of whom are citizens and some aliens,—volunteer to appear to the suit, and become parties with the tenant in possession, they cannot, by their own consent, thus transfer to this court a case not within the provisions of the act of Congress.

* 4 Washington's Circuit Court Reports, 286.

Where there is more than one person plaintiff or defendant, each must be competent to sue in the Court of the United States. The right to remove must exist in each, and all the persons suing, and against

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whom the opposite party may demand a decree or judgment.

How far several defendants in ejectment, who hold several portions of the land by several and distinct titles, may have a right to have their cases severed, so that one who has a right to remove may not lose his right by being made co-defendant with one who has none, is a question not in this case. But I doubt not, that the court in which such process has issued, may compel the plaintiff to discontinue and divide his action, and will not permit him, by joining defendants claiming by distinct and several titles, to injuriously affect the rights of either.

In the present case the defendants have not brought themselves within the description of the act. They are neither aliens, nor citizens of another State.

I am aware that this contraction of the act may tend to defeat the provision of the 12th section altogether, in actions of ejectment. "But the remedy," says Mr. Justice Washington, in the case above cited, "is with Congress."

CASE REMANDED.

[AT PHILADELPHIA.]

WOOD v. ALLEGHENY COUNTY.

[COUNTY BONDS PAYABLE TO BEARER: NEGOTIABILITY.]

Where a county is authorized by statute to issue bonds, but is subjected to certain restrictions in limitation of its power, and disregarding the limitations, issues them absolutely payable to bearer, and they pass into the hands of a *bond fide* holder for value, who has bought them in the market in the course of trade, the county is liable on them. The court will in such case not look behind the face of the bond, nor inquire whether the bonds have been issued with all the forms prescribed or not.

Ex. gr. The county of Allegheny was authorized by the Legislature of Pennsylvania to issue bonds in aid of certain railroads—but it was prescribed that the subscriptions should be advised by the grand jury of the county; and until the railroad was completed the railroad company should pay the interest on them. The jury advised the subscription, providing that no sales should be made below par. The bonds were issued to the company, who, having procured an act of Assembly to that effect, sold them greatly below par. Having passed into the hands of *bond fide* holders, who bought them in the course of trade, and being on their face payable to bearer, the county was held liable on them for the interest, the railroad having failed to pay it.

THIS was a suit brought to recover the interest due on several bonds of the county of Allegheny, which had been issued in aid of certain railway companies, and under authority or pretence of authority of statutes of Pennsylvania, giving the county power to take stock in them. The railways ran to other counties, and even into other States. The statutes, however, authorized the subscription, *only* after a previous recommendation had been made by the grand jury of the county in favor of it; and contained a provision that the railway companies, *and not the county*, should pay the interest on the bonds until the roads were completed. The grand jury had recom-

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mended the subscription, coupling their recommendation, however, with a proviso, as a condition of their recommendation, that the bond should *not be sold below par*. As soon as the recommendation had been obtained from the jury, the parties projecting the railways, or jobbers and brokers whom they employed, procured, by very irregular ways, an act of Assembly authorizing a sale irrespective of price: and the bonds were bartered away by the same class of people, at enormous, not to say at fraudulent rates of discount; the county officers, who had supposed that the railway companies would always be able to pay both interest and principal and that the county was but lending its credit, having been grossly negligent of the interests entrusted to them, while the railway agents themselves were men of no higher character than such as belongs to low politicians and swindlers. The acts of Assembly requiring the railway companies to pay the interest till the roads were completed, *were printed in full on the backs of the bonds*. The bonds were all payable *to bearer*, and the coupons in the now common form of such things. The railway companies having neither completed their roads nor paid their interest, the county was now sued by *bond fide* holders of the coupons of bonds for value.

For the county it was argued—

I. The county, as a corporation, has no power to make any subscription of this kind; and the Legislature cannot confer power on a body merely municipal, to exercise rights which belong only to its own competence.

II. But if this were not so, and if the county had power, the sale at anything less than par was illegal and void. The grand jury, which was a party to the

contract of subscription, had stipulated that the bonds should be sold *only* at par. They meant that the money to be received by the railway companies should go *pari passu* with the increasing indebtedness of the county; and to prevent that exact thing which has occurred, *st.*, a claim on the county for millions, while the money received by the railways has been less than thousands. The railway managers—receiving, doubtless, a large commission for the operation—“engineer” the matter through the grand jury room. They inveigle that body into a subscription, on the assurance that the bonds shall not be sold below par. Nor is this all: the grand jury themselves declare it to be a condition of their recommendation, that the bonds, if not *thus* sold, shall not issue at all. The managers of the railways then procure an act of Assembly annulling the condition. The county, engaging in an enterprize of risk, had a right to say on what terms it would engage; and it did say. It said: “*If* you can get as much *money* as is represented on the face of our bonds, we believe that you can build your road, and that it will be profitable; but unless you put dollar for dollar into your road against the debt which we are incurring for it, we will not take your stock at all.” This was a vital point every way; vital in point of law, and vital as respected the chance of the county’s getting dividends from the stock subscribed for. For unless the managers could get money enough to *complete* the road, the enterprise was certain to leave the county a debtor, while it was equally certain to bring nothing to pay the debt. The success or failure of the road depended on adherence to the condition. The grand jury contracts for

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such adherence. Can the Legislature, of its own power, annul the contract?

III. The statute made it obligatory on the companies to pay the interest on the bonds till the road was completed. This act being printed on the back of the bonds, was notice to the person about to buy the bond, that the county assumed but a limited responsibility. Subscribing to railways is no regular or proper business of counties, even conceding it to be lawful under any circumstances. But for the statute authorizing it, the subscription would be confessedly void. That is now, an adjudged point in Pennsylvania. The statute which makes valid the subscription, validates it only *quatenus et quodam modo*. As soon as a person saw one of these bonds at all, he saw the qualified liability. It must be observed, that this was not an unusual sort of limitation of a well known and usual sort of contract. Municipal bonds payable to bearer, and in aid of railroads, had not *theretofore* been usual instruments in the United States. They were quite new. The thing, in its general nature, was special. Why may it not be considered so in its particular character as well? The whole subscription might or might not have been rendered nugatory by such a provision as was here notified to the person about to deal in the bonds; but there the provision was, and was plainly. There was nothing illegal in it, and being as legible as the contract, and on the same sheet, makes part and parcel with it.

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GRIER, J. If the right of a municipal corporation to subscribe, even when authorized by the Legislature, to purposes so alien to its general purpose as the con-

struction of works of improvement which, in their largest part, are in distant counties and in other States, were open to me for consideration as a new point, I cannot say that I should hold such subscription other than simply void. The strongest arguments at law have been made against such subscriptions, and they are worth recurring to as containing true and lawyer-like views of the extent and character of municipal powers. But the matter is not open in this court. The Legislature of Pennsylvania has authorized counties to make such subscriptions, and the Supreme Court of the State has decided (though by a bare majority) that the act is constitutional. The views of that court upon the statutes of their own State bind this court.

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In spite, then, of all the resistance by the county to paying these bonds, here are the bonds, upon which the county "promises to pay." The county said to the railroad companies, "We want to help you: we have not the money, but we will lend you our credit: our promise to pay." That promise is, or should be, sacred. Doubtless many improper things have been done. The whole business of making cities and counties subscribe to railways was unwise. This will be admitted now; though the counsels of the able and conservative men who took ground against it was not heeded when given. Mercantile and popular clamor demanded "subscription." Traders, politicians, and all kinds of interested jobbers urged and drove the matter, while commissioners, grand jurors and legislators have been led in the train. It is to be lamented that such things should be done; but they *have* been done. If the electors of our cities choose to hand over the great concerns of our

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public offices to ignorant and unprincipled administrators, they must suffer for it. They must themselves bear the burdens which they put it in the power of knaves to pile upon them. Whatsoever a man soweth, that he shall reap; and when he sows the wind, he is apt to reap the whirlwind.

The objections urged against the plaintiff's claim would have force, if the question were between the county and the railway companies. But it is not. It is between an innocent holder for value of a bond payable to bearer, and the party who sent it out into the market (or handed it over to others to do so) where it has been sold in the course of trade. It is useless to bring forward here, as against the business operations of this day, abstract dogmas out of Blackstone and the Institutes of Coke. Such instruments as these are were never dreamed of in their day. The laws of trade suggest and govern these matters. As I said in the beginning: "Here is the bond. Here is the fact." Your promise to pay is put upon the market. You gave it this negotiable and coupon form for the purpose of facilitating sale, and preventing all questions of equity about it. And now, when the promise has been put on the market, and sold to an innocent holder, you set up these equities. That won't do. Why did you issue *your* bonds, if you meant that the holder should look to the railways? Why did you not leave the railways to issue their own? For this reason only, that you knew that capitalists would trust *you* and would not trust them. I esteem the bold, and hardy, and industrious people of this county. I feel for them, with this load of debt put upon them by the careless and unworthy persons whom they have elected into office. But

they have allowed the bonds to be issued and sold, and they MUST pay them.

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JUDGMENT FOR PLAINTIFF.

[AT PITTSBURG.]

MEM.—The county commissioners of Allegheny having still refused to pay the bonds, and refused obedience to a mandamus of the Supreme Court of Pennsylvania, to levy a tax for the said purpose, were all put into goal, where they remained for many months. An arrangement was finally effected between the creditors and the county, by which the principal of the bonds was acknowledged, and a reduced rate of interest accepted.

WOODHULL v. BEAVER COUNTY.

[DIFFERENCE BETWEEN PREVENTIVE AND REMEDIAL JUSTICE.]

A court will frequently issue process to prevent acts being done on the ground that they are unauthorized, which same acts, after they are done, the court will enforce as having been made in pursuance of authority sufficiently given.

Ex. gr. It will hold a county bond to pay bonds actually issued and negotiated by it under an authority assumed from an ambiguously and ill expressed statute—although had any citizen of the county applied for an injunction to restrain the issue on the ground of want of authority clearly given by the statute, the court would have granted such preventive remedy.

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* Act of April
7, 1853, Acts
of 1853, p.
335.

MOTION for a new trial; the case being thus :

A statute of Pennsylvania* authorized the county of Beaver to subscribe to the stock of a railroad; “*Provided*,” such is the language of the act, “that the amount of subscription shall not exceed \$100,000; the amount thereof shall be *fixed and determined* by one grand jury of the county, and upon report of such grand jury being fixed, it shall be lawful for the county commissioners to carry the same into effect by making, in the name of the county, the subscription so directed by said grand jury.

Nothing was here said about the issuing of any *bonds* by the county; but a second *proviso* enacted that “Whenever bonds of the county are given in payment of subscription, the same shall not be sold by said railroad company at less than par value.” The grand jury, without either “fixing” or “determining” any amount, “recommended the commissioners to make the subscription *in conformity to the*

act of Assembly." The commissioners accordingly issued negotiable bonds, binding the county (to what extent did not here appear); and having given them to the railroad company, this last put them in the market and sold them *bonâ fide* for what they would bring; in most cases much below par. The present plaintiff having bought certain of the bonds, and the county not paying interest, he sued it and got a verdict here for the amount. On a motion for a new trial, two questions were now presented.

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I. Had the commissioners authority to issue bonds by virtue of the above-mentioned act of Assembly, authorizing it to subscribe to stock?

II. Was the recommendation of the grand jury, which fixed no amount, sufficient to authorize the commissioners to make the subscriptions which they have made, and to execute the bonds issued thereon? this court having in a former case declared that when authority to do acts so far out of the ordinary range of county action was given, it ought to be given "in clear and unambiguous terms."

GRIER, J. This court has said that statutes conferring such doubtful and important powers on county or city officers as have here been exercised, should express the intention of the Legislature "in clear and unambiguous terms." We do not intend to retract the assertion, and if the only question before the jury had been whether these powers were vested in these commissioners in terms such as we have declared they ought, in all cases, to be given in, we might well have instructed them, that such was not the case. But it does not follow as a consequence of what we have declared to be the proper sort of language in which

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to vest such powers, that courts and juries must treat the legislation as a nullity, which is not conformable to our rule.

I am sorry to say that too many of the acts of the Pennsylvania Legislature granting powers most dangerous to individuals and the rights of property, cannot bear this test. As an excuse for this criminal negligence in those entrusted by the people with the exercise of this sovereign function, it is said, that all these acts of Assembly are drawn up by the persons known as outside or lobby members, who are employed for "a consideration" to solicit legislation by which speculators may advance their interests at the expense of the community. Be the reason what it may, we can only say that the persons who have drawn many of the statutes about railroad subscriptions lately brought to our notice, have exhibited an astonishing obliquity of genius in their selection of the terms used to express the intention of the Legislature. I will not say that it was the deliberate intention of these scribes to make the Legislature speak in such ambiguous terms, that they might be used to give credit and currency to certain securities by one interpretation, and by another to disown the bond and defraud the community. In the case of the bonds issued by the city of Pittsburg to the Allegheny Valley Railroad, such has been the result. But in this case, the meaning of the Legislature has not been so absolutely obscured by ingenious generalities of expression. Though not expressed in "clear and unambiguous language," this act is sufficiently capable of the construction that "the commissioners or a majority of them, are authorized to pledge the faith of the county by bonds drawn in the best approved forms to give them value in the

money market, to such an amount; not exceeding \$100,000, as the grand jury of the county may approve or direct;" and to provide for the payment of principal and interest of the same by taxation. And this interpretation we think it reasonable to give to it in the circumstances of this case.

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II. As respects the report of the grand jury. It cannot be denied that this report has been drawn by some blundering scribe who perhaps did not take the trouble to look at the statute under which he was acting. But if it requires charitable criticism to support the intention of the Legislature, how much more should it be extended to the acts of a grand jury! While the report fixes no amount, it yet recommends a subscription in conformity to the act of Assembly. If the commissioners have not yet subscribed to the full amount of \$100,000, they can so far as the report gives them authority.

If, indeed, this were an application to enjoin or suppress the issue of these bonds, I would say—

(i.) As respects the language of the act of Assembly, that we would be satisfied with nothing short of direct terms (which it would have been as easy to use as those that are used), and that we would not infer these great and dangerous powers from circumlocution and vague terms; and

(ii.) As respects the grand jury's report, that it was insufficient, because it does not in "*clear terms*" fix and determine the amount.

If any citizen of Beaver county had chosen to dispute the construction assumed by the commissioners both of the statute and of the report, the courts were open. He could have asked for an injunction and we would have granted it.

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But now, when all parties have given their construction to the act, and it *can* by its terms be made to include the power, the court will not exercise *astutia* to give it a stringent interpretation in order to enable a county to disown its obligations after having received their value.

NEW TRIAL REFUSED.

[AT PITTSBURG.]

BEDILIAN AND WIFE *v.* SEATON.

[STATUTE OF FRAUDS: TRUSTS CLEAVING TO THE LAND AS DISTINGUISHED FROM PERSONAL CONTRACTS: STALENESS OF DEMAND.]

A mere promise, though a solemn promise, by heirs at law—two brothers—to convey property as these heirs had declared to their dying brother that they would convey it—will not be looked on favorably as taking a case out of the statute against frauds, even though the promise was actually coupled with comforting assurances to the dying brother as to his health, and remonstrances by which this wish to make a will may have been controlled or even prevented; there being no proof of fraud in the case.

Even if the promise had been fraudulent, it would not present the case of a trust which adheres to land, in the possession of persons having notice; but only that of a contract of which chancery would compel the execution. Hence a bill to obtain the benefits of it would have to join the executors or administrators of the two brothers who made it, and could not be enforced against their heirs alone, though in possession of the land with notice.

Ten years from the time an involuntary disability of infancy is removed, “stales” a case not originally the best; and this is not altered by the fact that the cumulative disability of coverture was incurred after the involuntary one of infancy had ended: voluntary disabilities, even when not cumulative, not being received in equity as a defence to the charge of staleness.

BILL in equity for a discovery, account, &c.

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The wife of complainant was a natural daughter of Thomas Seaton, who died in July, 1831, intestate. A few days before his death, Seaton requested two friends of his, Messrs. Barclay and Jack, to come to his house (some twenty-eight miles distance) in order to draw his will for him; he intending to devise all his property to this daughter, who then resided with her mother in his house. Before they came, Seaton was taken suddenly much worse, and died within two or

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three days. During this time he appeared very anxious about the arrival of his friends, Barclay and Jack. His brothers, James and John, told him "*to make his mind easy, that his illness was not so dangerous, that he was not likely to die before they arrived.*" On the day preceding his decease, *he called his brothers to his bedside, and stated his desire that his daughter should have his estate.* The brothers, in presence of numerous witnesses said to him: "Brother Tom, make your mind easy—*give yourself no trouble about that, Harriet shall have it all—every cent of it.*" No will was executed, the friends not having arrived till after his death on the next day. When the funeral was over, the brothers, John and James, after conference with Mr. Barclay, who afterwards became the *guardian* of the daughter, and others, made a short conveyance of *one-third* part of all the real and personal property of deceased, which had come to them as heirs at law and next of kin, reciting as consideration for the deed that "it had been the intention of Thomas to leave his estate, or a part thereof, to Harriet, his natural daughter."

The promise to give the property to the daughter, "every cent of it," was proved by two female witnesses, of somewhat advanced years, and who gave an account not exactly the same; but whose characters for veracity stood unimpeached.

The daughter was born in May, 1823, and in her minority married one Barry. He dying in 1848, she married in November, 1851, the plaintiff, Bedilian. Her disability of *infancy* had therefore ceased in May, 1844, which was a little more than ten years before the filing of this bill, and the disability of her coverture contracted during minority had ceased four

years later, that is to say, in 1848, about six years before the bill was filed.

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The bill prayed for discovery and account of the property of which the father died seized; and that the equitable right of her, the daughter, to the same, might be ascertained, and the property or the value thereof be decreed to her.

Both the brothers, John and James, had died prior to the bringing of this suit, but neither *their executors nor administrators were made parties to the bill*. The defendants, however, were their *heirs, and in possession of some of the original property of Thomas Seaton, the father of the girl*.

The case now came up on demurrer to the bill; the grounds of the demurrer being that the statute of frauds was a bar, there having been a mere promise in the case, and this promise resting in parol; that the executors or administrators of the two brothers ought to have been joined, the case being one of personal contract, and not of a trust attaching itself and cleaving to the land; and finally, that twenty-five years having elapsed since the brothers took possession of the property claiming it adversely to the plaintiff's rights, and more than ten years since the daughter had arrived at full age, the title was barred by the statute of limitations, and the claim was stale.

For the complainants it was contended that the brothers were trustees for the girl. They had, in fact, *prevented* their brother from making a will, not only by their assurances that he was in no immediate danger, and by the promise that if he died "*Harriet should have it all, every cent ;*" but also by arresting his active intentions, in their entreaty that he should

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give himself no trouble about what he had been about to do, and had actually begun to do. "Otherwise"—to use the language cited below—he would have given himself the trouble. They stopped him.

In considering what amounts to *preventing* a man doing an act, an immense distinction must be made between the case of a man in active health and one who is sick and dying. In the case of a person *wholly* helpless every way; a person who, in the stages of expiring nature, looks imploringly and confidently on those around him for everything he wants—where death "absorbs him quite, drowns his senses, blinds his sight"—a word, a look, is as potent as, in another cause, superior physical force would be. A sick and dying man can make no actual and personal efforts in anything. He is to be likened in this respect to a child or to a person of feeble understanding. This man, it is plain, was greatly concerned; he had sent for certain friends at a distance, supposing when he sent that he would live to receive them. He now perceived that he was failing fast. He is impressed with a sense of his own dying condition. He wants to make a will at once and before they come. He calls his brothers to his bedside—he is about to "give himself trouble." He does in fact give himself trouble. His brothers stop it. They tell him that he will not die; that if he does die it will make no difference—for that his daughter "shall have all of it—every cent." They will not let him go on with giving himself the trouble which by calling them to his bedside *he had begun to take*. They arrest—stop—prevent all his efforts. There were numerous persons present; some one of whom could probably have drawn such a will as the case required, and could

certainly have found a person who could have done it. But all is *prevented* by the brothers. We need not go on the promise at all. We go on the case of a weak, dying, helpless man, arrested in what he knew were the last hours of his life, and arrested of necessity, in what he was in the very act of setting into operation. The case is stronger than *Oldham v. Litchfield*.^{*} In that case Litchfield had devised land to his brother; this brother having *promised* the testator that he would pay an annuity to a nephew: "Otherwise"—the case says—"the testator would have charged his real estate with the payment of it." On bill filed, the brother was made to pay the annuity, notwithstanding the statute. In the present case there can be no reasonable doubt but that "*otherwise*"—that is to say—but for the assurances, and the *remonstrances* and promises of the brothers, a will would have been made. The case in fact resembles *Thynn v. Thynn*,[†] where Mr. Thynn had made a will, and in it had made his wife executrix. The son hearing of the will, came to his mother in the lifetime of his father, and persuaded her that there being many debts, the executorship would be troublesome to her, and desired that *he* might be executor. He induced his mother to ask the father to appoint *him*, declaring that he would only be an executor in trust for her. The father thus made the will anew; and on a bill filed, "the Lord keeper, *notwithstanding the statute of frauds and perjuries, and though no trust was declared in writing, decreed it for the plaintiff.*"

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* 1 Vernon,
506.

† 1 Vernon,
296.

2. As respects the non-joinder of parol representatives, we are not bringing suit for a breach of contract, but for enforcing a trust against parties not purchasers, and now in possession of the land. There

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were promises made to the dying man no doubt; and these come in to aid us, not as promises, but along with remonstrances and assurances—as *acts* which prevented a dying man from going on with what he had begun. At all events, we can amend the pleading by adding the personal representatives.

3. If the trust is plainly proved, the objection of staleness is not sufficient. The child was eight years old, when this fraud was accomplished. Her innocence and infancy are plain, and the disability is not a legal position, but an actual truth. Then before the disability of infancy had ceased, the disability of her marriage in minority with her first husband, Barry, supervened. This disability ceased only in 1848, six years before this bill was filed. There are no laches here considerable enough to be a bar.

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OPINION.

GRIER, J. If the property had been devised to John and James under a parol agreement by them, that they would hold it in trust for Harriet, the case would be like that of *Hoge v. Hoge*,* and numerous others, in which equity treats the fraudulent procurer of the legal title as a trustee *ex maleficio*.

* 1 Watts, 163.

But in this case the title of the brothers did not arise by deed from Thomas. Their title was by descent; cast upon them by the law of the land, because of the intestacy of their brother. The intention of Thomas to make a devise of his property to his natural daughter having never been legally executed, gave her neither a legal nor equitable title to it. John and James are not the fraudulent grantees of the land, and have not received or accepted a legal title in trust from Thomas. They have made a solemn promise to their brother on his death-bed; and assuming the con-

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spiracy charged in the bill (though not substantiated in the evidence), that in consequence of that promise a will was not made, was this anything more than a parol contract of which chancery is asked to enforce the specific execution? The bill sets forth no acts or declarations from which a *fraudulent* intention would necessarily be inferred. The exhortation to the brother to make his mind easy, that he was not in danger of immediate dissolution, may have been made in perfect good faith and kindness. Nor does the fact that the decease took place before the arrival of the scrivener, leave any necessary inference that a will would have been made if the promise had not been made. As a naked promise, without consideration, it would not be enforced by equity in the face of the statute. As a trust it could not be, where the alleged trustee did not receive the property by some gift or devise to which a trust was annexed. Nor was the trust left out of a will or conveyance on account of any promise of the devisee or executor, as in the case of *Oldham v. Litchfield*, cited from 2 Vernon, 505, where lands were charged with an annuity on proof that the testator was *prevented* from charging them in his will, by a promise of payment by the devisee; nor is the case like the other case cited from 1st Vernon, 296, *Thynn v. Thynn*, where a son *induced* his mother, by *promising to be a trustee for her*, to prevail on her husband to make a new will and appoint him executor in her stead. In these cases from Vernon, the conduct of the devisee was a fraud practised not only on the party intended to be benefited, but on the testator from whom he received the legacy or devise. A mere *promise* is not enough to take the case out of the statute, else the statute which requires a will to be in

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writing would be inoperative. The foundation of the decree is the *fraud* of the person who has obtained the legal estate, or other benefit under the will, by means of a promise which he never intended to perform.

II. But assuming the charges of the bill to be true and well pleaded, and that the heirs expectant, when they made this promise, *fraudulently* prevented the intestate from making a will in favor of his daughter ; (as on a demurrer we are bound to assume) still the bill does not present a case of a trust which adheres to the title in the hands of the promisees, and their heirs or others having notice: it is but a parol promise or contract which, on account of the fraud practised on the intestant and his intended devisee, chancery will compel the heir to specifically execute, either by transfer of the property or its value to the intended devisee. But as a parol contract, and not a trust descending with the land, or a covenant binding it in the possession of the heirs, how can a bill to enforce a mere *personal* contract be maintained against the *heirs alone*? Admit that a chancellor would have compelled the brothers on a bill filed in their lifetime, to make good this promise made to Thomas in favor of his daughter, either by actual transfer of the property itself, or payment of its value. Still the remedy in equity, as at law, would be against the personal representatives, the executors or administrators of the promisors. The estates of the decedents, whether they came by inheritance from the intestate brothers or otherwise, might have been taken in execution to satisfy the judgment or decree. In this way the property inherited by the present defendants might all have been made liable as assets.

III. But assuming that the bill might be so amended by making the executors parties, if any there be, and that the claim of complainants might be relieved from this difficulty by leave of the court, still it is met by the defence of staleness. Except in cases of direct trusts not denied, the statute of limitations is as applicable to bills in equity as to suits at law. It would be superfluous to repeat the well established doctrines of courts of equity on this subject, further than referring to *Wagner v. Baird*.*

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THE COURT'S
OPINION.

* 7 Howard,
234.

IV. Infancy is an involuntary disability, and would justly be considered in a case of this sort, but as in courts of law cumulated disabilities will not be permitted to hinder the running of the statute of limitations, so in courts of equity voluntary disabilities, such as coverture or absence from the State, even where not cumulative, will not be received as a defence against the charge of staleness. At all times this jurisdiction of enforcing parol trusts or parol promises to convey property, is one to be cautiously exercised. Courts of Chancery proceed in these cases against the letter of the statute, on the ground of preventing frauds from being successful, by pleading the statute *against frauds*. But the spirit as well as the letter of these statutes would be wholly annulled, if legacies or devises not written in a will, or contracts for the sale of realty enforced, by the vague, uncertain, and too often imaginary recollections of old women or old men after a great number of years. Those who swear to conversations are never accurate; the omission of a part of a conversation, the leaving out of a single adverb, pronoun or preposition, may unintentionally convert a partial truth into a great lie.

V. After forty years' experience at the bar and on

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OPINION.

the bench, I must say, that I think courts had better never have relapsed the stringent rule of these statutes. Courts, as well as juries, are too apt to be led away by the cry of "Fraud!" We all hate fraud, and are too willing to assume the functions of an overruling Providence, and punish it by arbitrary power. This feeling of virtuous self-complacency too often leads to hasty decisions and dangerous precedents. I have known a valuable property converted into a trust, by the testimony of an old woman who recollected and construed a *nod*, after some twenty-two years, into the acknowledgment of a trust.*

* See Jones v. McKee, 8 Barr, 496.

The promise which this bill calls upon us to enforce against the heirs of the promisors (on the recollection of one or two old women, who do not agree with one another, nor with that laid in the bill) purports to have been made some twenty-five years ago. The disability of infancy was over more than ten years before the filing of this bill. There is no allegation of any fraudulent concealment of her rights from the complainant; no reason why she might not as well have brought her suit during the life of her first husband, as in that of her second.

Decree for
Defendants.

However romantic the story may be, that seeks to divest men of property held in descent by the second generation, on a cry of fraud set up after all the alleged parties to it are long dead and their executors after them, I am happy to say, that the rules which govern a court of chancery in cases of this kind fully justify me in dismissing this bill as stale, and that the lapse of time appearing from the face of the bill itself is a complete bar to the relief sought.

DECREE FOR DEFENDANTS.

[AT PITTSBURG, MAY SESSIONS, 1859, NO. 17.]

ALLEN'S HEIRS v. ALLEN'S EXECUTORS.

[MARSHALLING OF ASSETS: SUBROGATION.]

Where an annuity left by will is charged "on real and personal estate," and legacies are also given, but are not charged on any special fund; equity will, as against heirs who are not at the same time devisees, order the annuity to be paid out of personalty, if there be personalty enough to pay both annuities and legacies; or if there be not enough to pay both, and the annuity has been already paid out of personalty, will subrogate the legatees to the annuitant: *Aliter*, as is said, though not decided, if the parties claiming the realty are *devisees*, and if the personalty has been exhausted by *creditors*.

ALLEN, by his will, ordered that "*first and foremost* there be secured to my dear wife" on my *real and personal estate*, an annuity "of \$1,200 a year, to be punctually paid semi-annually during her lifetime, and that my executors pay all taxes on the premises occupied by my wife during her lifetime." Then followed numerous legacies to individuals, to corporations, and for pious uses, *exceeding in amount the whole personal estate, but not charged, like the annuity, on the realty*. The will made no disposition of the realty, and consequently it descended to the *heirs*, the present complainants. There was enough of personal property, and enough of realty, to answer the annuity, independently of each other. And the questions now before the court were whether the annuity should be paid out of personalty exclusively, or out of realty exclusively, or if out of both jointly, in what proportion, and out of what fund the "taxes" should be paid?

MAY SESSIONS,
1860.
STATEMENT.

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1860.

THE COURT'S
OPINION.

GRIER, J. This annuity being the first and only charge on the whole estate, real and personal, the widow may have it satisfied out of either or both, at her election. But if paid in the first place out of the personalty, will not equity so marshal the assets as to substitute the legatee's to the annuitant's security on the realty?—or, what would amount to the same thing, order that the annuity be paid in the first place from the rents and profits of the realty? We must observe that the complainants claim as *heirs*, not as *devisees*; they are not objects of the testator's bounty. In such a case if a creditor, by bond or covenant having a right to satisfaction out of both, be paid out of the personal assets, so as to leave nothing to satisfy the general legacies, equity will not marshal the assets and pay the legacy out of the land devised; nor even, it is said, against a residuary devisee of realty. But the heir is not so favored. As against him the court will so marshal the assets, that the general legatee shall be substituted to the right of bond debtors against the realty, to the extent to which the personal fund has been diminished, by his election of his satisfaction out of it. It is settled, also, that where one legacy is charged both on realty and personalty, and the others are not, if the personal estate be insufficient to pay all the legacies, a court of equity will marshal the assets; and if the legacies charged on the real estate are paid out of the personalty, it will substitute the legacies not so charged to that amount, as against the realty. The courts also have in some instances compelled legatees whose legacies were charged on real estate, to resort to this estate for payment.*

These principles dispose of the case. As against heirs (the complainants in this case), the general

* Ram on Assets, chap. 28, § 3, and cases cited.

legatees have a right to require that the annuity be satisfied out of the rents, or by sale of the realty, and so far as the personalty has been applied to the payment of this annuity, they have a right to be substituted against the realty. The taxes which the executors are ordered to pay for the widow are not made a charge on the realty, and must therefore be charged to the account of the personalty.

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1860.THE COURT'S
OPINION.

DECREE ACCORDINGLY.

[AT PITTSBURG.]

DEN EX DEM. ROBERTS v. MOORE.

[ACT OF LIMITATIONS: ADVERSE POSSESSION.]

The act of limitations of New Jersey, limiting the right of entry on lands to twenty years, provides that in case of certain disabilities, the time during which the person who shall have the right of entry, shall be under any such disability, shall not be taken or computed as part of said period of twenty years. *Held*, that when the statute has once begun to run, it will continue to run over all subsequent disabilities.

The ruling of the Supreme Court of New Jersey, in *Den ex dem. Clark v. Richards* (8 Green, 347), approved.

A refusal by one tenant in common to let his co-tenant come in or participate in the enjoyment of the common property, is equivalent to turning him out, and constitutes an adverse possession.

The possession of lands by an agent or manager, is an *actual* possession, within the meaning of "the *thirty years* act" of New Jersey; and constitutes an adverse possession as against a co-tenant.

SEP. SESSIONS,
1860.

STATEMENT.

THIS was an action of ejectment for three-eighths of sixty thousand acres of land in New Jersey, known as the "Weymouth Furnace Tract."

Both parties claimed under Joseph Ball, who died in 1821, intestate. His nearest relatives were a surviving uncle and aunt, and forty-one cousins. At the time of his decease Ball held *three-eighths* of the tract, in fee, with furnace, &c., on it, as tenant in common with one Samuel Richards, who owned *three-eighths*, and a Mrs. Condit, who owned *one-fourth*.

Shortly after the death of Mr. Ball, and more than thirty years before the commencement of this suit, Richards, supposing that under the New Jersey statute of distribution, the uncle and aunt were the only heirs, to the exclusion of the cousins, purchased the interest of the uncle and aunt. Having thus procured the

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Ball interest, he purchased out also Mrs. Condit in 1829, and thereby became, as he supposed, the sole owner of the property, and continued to carry on the furnace, and to cut and convert the timber and lumber on the premises to his own use until 1842, when he died, leaving a will, by which he devised the entire tract with the furnace to his two daughters, whose husbands have ever since held the lands, and carried on the furnace upon them; cutting the wood and timber at pleasure. It appeared also that after Mr. Ball's death the cousins had claimed and received a share of his *personalty*, but had not claimed this land.

Among the cousins left by Mr. Ball, were Mrs. Johnson, a widow, who continued so until her death, in 1828; one Smith, who died in 1832; and Custer, who died in 1829. There were nine lessors of the plaintiff: three of them were the children of Mrs. Johnson, and were married women when she died; one was a daughter of Smith, and was married when he died; and five were daughters of Custer, and were married when he died. The husbands of four of these lessors were still living, and joined in the suit; the husbands of the other five were dead, but the time since their deaths added to the time which had elapsed between the death of Mr. Ball and their respective parents, as above stated, would in no instance make twenty years, so that, if barred by the statute of limitations, it would only be on the principle, that the statute began to run against the parents before their death, and afterwards continued, notwithstanding the coverture of the lessors.

The suit was commenced in 1858, more than *thirty* years after the conveyances by the surviving aunt and

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STATEMENT.

by the heirs of the surviving uncle of Mr. Ball, and more than *twenty* after the said three cousins, under whom the lessors of the plaintiff claimed, had died.

There had been no claim made by or under any of the cousins of Mr. Ball, from the time of his death in 1821 to the commencement of this suit in 1858—a period of between thirty-seven and thirty-eight years.

The statute of limitations in New Jersey provides, that “thirty years’ actual possession of land, uninterruptedly continued, wherever such possession was obtained by a fair *bonâ fide* purchase of any person in possession and supposed to have a legal right and title thereto, shall vest an absolute right and title in the actual possessor;” provided that any person under legal disability, when his or her “right or title first accrued,” shall have five years to sue after the disability shall be removed. It also provides, that no person shall enter on lands, “but within twenty years next after his or her right or title shall accrue,” provided that the time during which such person “shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as a part of the said limited period of twenty years.”

The question now was : whether the lessors of the plaintiff were barred by the statute.

Messrs. *Voorhees* and *W. L. Dayton*, for plaintiffs.

Messrs. *Carpenter* and *Browning*, contra.

THE CHARGE.

GRIER, J. Statutes of limitation are statutes of repose, and should be fairly and honestly executed. They are for the peace of society. Indeed, the well-being of society demands their faithful execution. The getting-up of latent claims, to the disturbance of

possessions of long standing, if encouraged, would be an intolerable mischief to any community.

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1860.

THE CHARGE.

When Mr. Ball died, all of his next of kin came forward, and claimed his personal estate. Legal proceedings were instituted and prosecuted for its distribution among them. The cousins made no claim to these lands, of which they could not have been ignorant. Indeed, they assented to, or at least acquiesced in, the claims of their uncle and aunt, so that the construction now sought to be given to the statute of descents—whether right or wrong—and we assume it here to be right—is a *new discovery*. If they were then under a mistake, and suffered others to take possession of lands as their own which belonged to them in common, this was a voluntary ouster, or rather the confession of ouster on their part; and it is now, at the expiration of nearly forty years, too late to correct this error, if it was an error.

Although the phraseology used in the New Jersey statute of limitations is different, in form, from that of the English, it is, in my opinion, in substance, the same; and under the English act, as well as under similar acts in this country, it has long been a well-established principle, that when the statute once begins to run, it continues to run over all intervening disabilities: that is, if when the title *accrues* to a female, she should be a single woman, although she should subsequently marry before the expiration of the twenty years, yet the statute would run on the same as if such marriage had not occurred; and at the expiration of the twenty years her title would be gone, the same as if she had not married. This is a settled construction of the English act, and, I think, it is also the true construction to be given to this act.

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1860.

THE CHARGE.

Any other construction would stultify the Legislature, and render useless the act itself. Instead of being a statute of repose, it would open the way for the very mischiefs it was intended to remedy—dormant claims might be continued for a century, and then awakened up to the serious disturbance of long established possessions. Whilst I feel myself bound to follow the constructions given by the State courts to their own statutes, although differing from them, yet I concur in the opinion of your own Supreme Court, made A. D. 1836 in *Den v. Clarke*, 3 Green, 347. This is the law of New Jersey as declared by its Supreme Court more than twenty years ago; twice subsequently affirmed by the same court in the years 1844 and 1845. A dictum of Judge Washington,* however much entitled to respect, as coming from that distinguished jurist, appears to have been hastily expressed, without the advantage of an argument, and cannot be regarded as well considered.

* 4 Washing-
ton's Circuit
Court Reports.

It would be an indiscreet exercise of judicial discretion, after a statute affecting title to real property had received the construction of the courts of the State in which it was passed to express even a doubt of its correctness. To reverse such decisions, after they have become rules of property, might unsettle titles, increase litigation, and work intolerable evils. Since the modern discovery of short judicial terms and frequent elections, this evil would be magnified, if in such cases, as often happens, the last judge should affect to exhibit his wisdom by overruling his predecessor. Change of law by statute operates only on the *future*; but, if made by judicial decision, it re-acts on the *past*, and may destroy titles before valid and undoubted.

If, then, there has been an adverse possession by the defendant in this case, and those under whom he claims, for twenty years, and if that adverse possession commenced to run against persons under no legal disability, their right of entry is barred, whatever disabilities may have subsequently occurred.

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1860.
THE CHARGE.

The lessors of the plaintiff claim under three of the cousins of Mr. Ball, who were living at the time of his decease, in 1821. One of these cousins was then a widow, and so continued for more than seven years after, when she died, leaving daughters, who were then married women. The other two cousins were men, who lived from eight to eleven years after Mr. Ball; and at their deaths, their interests (if any) vested in their daughters, who were then married. If the statute commenced to run against these cousins before their respective deaths, it continued on, although their heirs were married women, and have so continued ever since.

Adverse possession may be by one tenant in common against his co-tenant, as well as when no co-tenancy exists. It is true, as a general rule, that the possession of one joint tenant, or tenant in common, is the possession of the other; and that a mere failure to account for the proceeds by the tenant in actual possession does not amount to an ouster. But there need be no actual turning out. A refusal by one joint tenant, or tenant in common, to let his co-tenant come in, or to participate in the enjoyment of the common property, is equivalent to turning him out. It is a question of *intent* by the actual occupant, and this *intention* may appear as well by actions as by words. It requires no special or verbal notice, but may be inferred from outward acts. Open and notori-

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1860.

THE CHARGE.

ous claim of ownership, and exercise of exclusive right, amount to actual ouster. If one take possession of property under a mistake in law, supposing it to be his, and the real owner—standing by—acquiesces, his conduct is a voluntary or confessed ouster on his part, and he cannot afterwards, when he discovers the mistake, say such possession was not adverse.

I think, also, the *thirty years'* limitation applies to this case: possession by an agent or manager, is actual possession within the meaning of the statute. If, upon the death of Ball, it was supposed by all the cousins that the property descended to the uncle and aunt, and the tenant or manager acknowledged them as the owner, they may be considered to have been in possession; and the deeds made by them or their heirs *bond fide* and for a valuable consideration, are such conveyances as that actual possession under them for thirty years, would give title.

The conduct of the cousins clearly shows, that they considered themselves ousted; and the conduct of Mr. Richards, in his long enjoyment as sole and absolute owner, cutting off all the timber, and in many instances re-cutting it, and in the open and extensive business continually carried on upon the premises for himself, and for no other, shows an adverse holding by him.

VERDICT FOR DEFENDANT.

ELLIOT v. VAN VOORST ET AL.

[SOVEREIGNTY OF THE UNITED STATES AS AFFECTING ITS SUB-
JECTION TO SUIT.]

The rights of the United States Government, as a sovereign, and its prerogatives as such, are co-extensive with the functions of government committed to it.

When it purchases land within a State, not intended for forts, arsenals and other national uses, but merely to secure a debt, it takes the land as any other corporation, and cannot claim any of the immunities or prerogatives of a sovereign.

Consequently, a mortgagee may have a valid decree in chancery for the sale of the mortgaged land, where the United States is owner of the equity of redemption, on a notice given in any manner the court may prescribe.

The jurisdiction of the chancellor to order such sale, depends on the locality of the land, and not on the domicile of the owner of the equity of redemption. The regularity of such a sale cannot be called in question in a collateral suit.

THIS was a bill for the redemption of a mortgage of a lot of land. The complainant claimed to be owner of the equity of redemption. The respondents claimed under a judicial sale of the property, under a decree of the Court of Chancery of New Jersey, in a bill to foreclose the same mortgage.

NOV SESSIONS,
1860.
STATEMENT.

The history of the title was this: Van Voorst was the original owner of the lot. He sold it to one Innis, who reconveyed it on the same day, by way of mortgage, to secure a balance of the purchase money. Innis conveyed his equity of redemption to one Swartwout, collector of the port of New York. Swartwout becoming a defaulter to Government, this lot was seized, sold and bid in for the United States, and a deed made to them by the marshal. The complain-

Nov. Sessions,
1860.

STATEMENT.

ant claimed under the United States, whose title he had bought.

Neither principal nor interest having been paid on the mortgage to Van Voorst, the mortgagee for some time, and the land being vacant and unproductive, and the only remedy left to him being a sale of the land under his mortgage, he filed his bill in the Court of Chancery of New Jersey to have his mortgage foreclosed, and the land sold to satisfy the debt due on the mortgage.

The bill set forth that the United States had become owner of the equity of redemption, and prayed that a notice or subpoena might issue to J. S. Green, Esq., attorney of the United States for New Jersey district, that he answer in behalf of the United States, and show any defence against the prayer of the bill, Accordingly, the district attorney *appeared and filed an answer*, admitting the charges of the bill, and submitting to the court to take care of the interest of the United States in the mortgaged premises. The Court of Chancery thereupon adjudged that the mortgage money and interest was due and unpaid, and ordered, "that so much of the mortgaged premises as will be sufficient to raise and satisfy the debt, interest and costs, be sold, and that a writ of *fi. fa.* do issue for that purpose, and that defendants be debarred and foreclosed from all equity of redemption." On this decree a *fi. fa.* was issued, and the premises sold and conveyed by the sheriff to the defendant, Van Voorst.

The land being wholly unproductive and without buildings or improvements, Van Voorst laid it out in town lots, and sold the same at different times to persons, nearly all respondents in this case, who had

entered, built and made improvements greatly increasing the value of the land. Nearly twenty years had elapsed since the mortgage title was forfeited.

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1880.
STATEMENT.

The question now presented was, whether the judicial sale by the Court of Chancery of New Jersey, to satisfy or foreclose the mortgage, is valid or void; the complainants contending that it was void, because the United States, being a sovereign, could not be sued in the State court of New Jersey.

GRIER, J. It is undoubtedly true that no action can be sustained against the government of the United States for any supposed debt or claim unless by its own consent, or some special statute allowing it.*

THE COURT'S
OPINION.

* 11 Howard,
290.

The sovereign himself being the source of justice and power, exercising the same through his courts, is always presumed to be ready to do justice. It is, therefore, part of his prerogative, that he cannot be sued in his own courts. Nevertheless, the subject was entitled, when he claims anything from the crown, to have his "petition of right." Upon such petition the crown ordinarily directs that right be done to the party; and the petition is then referred to the chancellor to be executed according to law, and directions are given that the attorney general be made a party to the suit. In other cases where the crown is not in possession, and its rights are only incidentally concerned, it is generally considered that the attorney general may be made a party in respect of these rights, and the practice has been accordingly. In the United States the proceeding by petition of right is unknown. The government of the United States, though limited in its powers, is supreme in its

NOV. SESSIONS,
1860.

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OPINION.

sphere of action. But its rights as a sovereign, and its prerogatives as such, are co-extensive with the functions of government committed to them, and extend no farther. Its position as to prerogative is anomalous, owing to our peculiar institutions.

It is part of the functions committed to this government to build forts, arsenals, navy yards, &c., &c. It may purchase and hold land for these purposes, yet it cannot exercise exclusive legislation over such lands, although used for national purposes, without the consent of the Legislature of the State where the land lies. A State has no power by taxation or otherwise, to retard, impede, burthen or control the operation of the constitutional laws passed by Congress to carry into effect powers vested in the national government. Hence she may not have power to tax navy yards, or other property of the United States held within its bounds for public or national uses. But it does not follow that when the government officers purchase land in the name of the United States to secure a debt, as any individual or private corporation might do, that it thus ousts the jurisdiction of the State to tax it, or in any manner affects the liens or rights of mortgagees in such lands. In the mere exercise of a corporate right, the government of the United States cannot claim the prerogatives or immunities of a sovereign. She cannot compel a mortgagee to the hopeless remedy of a petition to Congress to redeem. The courts of New Jersey cannot thus be ousted of their jurisdiction and duty to assist the mortgagee to have his mortgage satisfied, and the mortgaged premises sold for that purpose. When the government, in the exercise of the rights and

functions of a civil corporation, purchases lands to secure a debt, the accident of its sovereignty in other functions cannot be set up to destroy or affect the rights of persons claiming a title or lien on the same lands. Thus, when the government of the United States became a partner in a trading corporation, such as the United States Bank, it divested itself, so far as concerned the transactions of that company, of its sovereign character, and took that of a citizen; consequently, its property and interests were subject to the decrees and judgments of courts, equally with that of its copartners.

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1860.

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OPINION.

When Van Voorst came into the Court of Chancery, he had a clear right to have the mortgaged lands sold to satisfy his mortgage. The court was bound to furnish him a remedy. The land mortgaged was within the jurisdiction of the court. The only difficulty in the case was, that the title of the mortgagor, who should be made a party to the proceeding and have an opportunity to show that lien was paid or discharged, was vested in the United States, *quoad hoc*, a foreign corporation, and not within the jurisdiction of the court. It could not be compelled to appear or submit itself to such jurisdiction, so neither could any non-resident individual or corporation. The usual way to warn such absent parties is by advertisement. When such absentee does not choose to come in voluntarily and appear and make defence, he is made a party without his knowledge or consent. The jurisdiction of the court over the land decreed to be sold, is sufficient to justify the decree and validate the sale, as regards the property sold, but no decree could be made against the person not within the jurisdiction,

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OPINION.

that could bind him or be regarded as valid in another tribunal. In this case the Court of Chancery of New Jersey had jurisdiction over the thing or land mortgaged; it could not compel the United States government to appear and submit itself to the judgment, or render any judgment that it should pay money; but it can prescribe what notice should be given to the mortgagor or owner of the equity of redemption, and how it should be given. In analogy to the proceedings in the Court of Chancery in England, it was ordered that the subpoena be served on the representative of the government, who, *quoad hoc*, might be treated as the attorney general. The attorney appeared and answered on behalf of the government. The presumption is that he was duly authorized so to do. Through him the government had notice, and might redeem if it saw fit. The decree demanded nothing of the United States. It is only for a sale of the mortgaged premises, to satisfy a legal lien. After thus refusing to redeem, after full notice, the government ought to be estopped. Its vendee, with full notice of this judicial sale, has no equity—nor should he now be allowed to wrong *bona fide* purchasers under the cover of the sovereign prerogatives of the United States.

I am of opinion, therefore, that the Court of Chancery of New Jersey had jurisdiction to effect a sale of these mortgaged premises, in satisfaction of the lien; that its decree and the sale under it, are not void for want of jurisdiction—and that their regularity cannot be called in question in a collateral suit. If irregular and erroneous the decree might have been set aside on writ of error.*

* Grignon v. Astor, 2 Howard, 319; Grifflith v. Bogart, 18 Howard, 164,

It may be said there is no precedent in this country for precisely such a case as that before the chancellor. The answer to this may properly be, "It is time there was one."

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1860.
THE COURT'S
OPINION.

BILL DISMISSED, WITH COSTS.

[AT TRENTON, OCT. 30, 1860.]

MOREHEAD v. JONES.

[EQUITY PRACTICE.]

In a bill for infringing a patent the defendants were allowed, under special circumstances, and there being no laches, to strike out an admission in their answer, that they had made certain articles, their making of which the complainant was seeking by the bill to enjoin.

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1860.

STATEMENT.

MOREHEAD & Co., as assignees of a patent granted to one Sherwood for an improvement in door locks, filed their bill at the last term to restrain the respondents from infringing, and for an account.

The defendants answered, admitting their use of the improvement, and claiming a right to use it by reason of a prior assignment to them by the patentee. They also filed a cross-bill, alleging their ownership of the patent, and praying for an injunction and account as against the complainants. After answer and replication, and when the parties were about to begin taking their testimony, the defendants, at the same term to which the bill was filed, made application to a judge of the court, by petition, for leave to amend their answer by striking out an admission that they had made door locks having substantially the improvements mentioned and specified in the patent, *as stated in the complainants' bill*, and inserting a modified admission, denying an infringement of any of the claims of the patent, except one of them, which was specified. They prayed for leave, also, to amend by taking an issue to the validity of the patent to Sherwood. The ground of the application was, that

supposing Sherwood to have a valid patent, they had purchased a right to use it; that after filing their answer they had discovered that it was not a good patent, and that the assignment made to them was bad. Accompanying their petition was an affidavit that the matters and things set forth in their proposed amendment had only recently come to their knowledge, and since they had filed their answer.

NOV. SESSIONS,
1880.
STATEMENT.

The district judge to whom this application was made did not grant it when made to him, but adjourned the matter till the present term, when the motion was again argued before the court. In the meantime the testimony on both sides had been taken, and the case set for hearing at this term.

GRIER, J. That amendments may be allowed by the court after issue and at any time before final decree, when it is manifest that the purposes of substantial justice require it, is admitted. But while it is thus admitted that the courts have such authority in the use of a sound discretion, they must be very cautious in its exercise. When the object is to let in new facts and defences wholly dependent on parol testimony, the reluctance of the court is greatly increased.

THE COURT'S
OPINION.

As the bill in this case was filed to the last term, and as the application for leave to amend was first made before the testimony was taken, it is not subject to the charge of laches, or great delay. The defendants have sworn also that the matters and things set forth and contained in the said proposed amendment only recently came to their knowledge, and subsequently to the filing of their said answer. This can only refer to the last matter of amendment, to wit, the invalidity

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of the patent. As to the first and second, there is no allegation or proof of any mistake of fact or law in the answer first sworn to, or that the extent of their infringement was not as well known before as since the answer was sworn to. These amendments cannot be allowed.

The only question, therefore, is, whether the respondents should now be allowed to set up a matter of defence inconsistent with their first answer. Assuming their answer and affidavit to be true, the case stands thus: They purchased a patent right from the patentee; supposing they had obtained a valid patent: they make defence to the complainants' bill, alleging a previous purchase: after filing their answer, they discover that the patent is invalid and their title to it good for nothing. Why should they not be allowed to contest the validity of the patent, and show that the complainants, as well as themselves, have been defrauded by the patentee? For if, under such circumstances, the respondents should be enjoined from using the supposed invention, it would present this anomaly, that the respondents would be hindered from using that which belongs to the whole world. Under the peculiar circumstances of this case, we think it would not be an abuse of the sound discretion of the court to permit the respondents to file a supplementary answer setting up this defence, on payment of costs which have accrued on the abandoned defence:

1st. Because there has been no laches or delay, the application being made during the term to which the bill was filed.

2d. The application was made as soon as the fact was discovered, and before any testimony was taken.

3d. If the defence be true, as we now assume,

although the defendants might have discovered it before by proper diligence, yet believing their title to the patent better than that of complainants, their attention was not called to contest its validity till they discovered the invalidity of the title which has been imposed on them by the patentee.

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4th. There is nothing contradictory or inconsistent between the answer as filed and the amendment proposed to be made: The first was made under the supposition that the patent, as well as the respondents' title to it, were valid. The new discovered defence admits they were doubly wronged by a bad title and by a worthless patent.

Whether this defence can be satisfactorily established is the matter to be tried.

GOODYEAR v. DUNBAR.

[INJUNCTION: VALUE OF A PATENT AS EVIDENCE OF ORIGINALITY.]

Wherever a defendant in equity—not alleged to be insolvent or likely to become so—presents, by answer or otherwise, a case which shows a *bona fide* issue in fact or law, or a *prima facie* right to continue his manufacture, founded on a decree of the patent office and a consequent public grant, the court will give a preliminary injunction, even in favor of a prior patentee, holding a patent for the same general purpose, only when there is a clear mistake of some sort. This kind of process being, in fact, an execution before judgment, is to be used cautiously.

However, if there is doubt in the case, as there naturally is, when the two patents are for the same general purpose, the court will commonly direct the defendant to keep an account.

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1860.
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STATEMENT.

THE complainant, Goodyear, had a patent, amended in 1849, for a new and useful improvement in “processes for the manufacture of India rubber.” The defendant also had a patent obtained at a later date, viz. in 1859, “for a new and useful improvement in treatment of India rubber.” The process of each of these patents had for its result a compound or substance having the same qualities, and known in trade as “*Vulcanized India Rubber*,” and both patents purported to be for original discoveries; the defendant’s patent not purporting to be for an *improvement* on the plaintiff’s process.

Goodyear now sought to restrain Dunbar, by preliminary injunction, from manufacturing this vulcanized India rubber, he, the said Goodyear, alleging that Dunbar’s process was in fact the same as his; and whether it was or not, was the great question

between them, and one which of course had to be decided in the affirmative, before the injunction could be granted. It was not alleged in the bill that Dunbar was insolvent, or likely to become so.

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1860.
STATEMENT.

GRIER, J. The defendant, in virtue of his patent, has a *primâ facie* legal right to manufacture his compound by his process. Whether this process is a mere colorable change from the older patent, or whether his manufacture is the same combination or compound with that described in the plaintiff's patent, is the great question in dispute between the parties. So far as the judgment of the patent office affects the case, this question may be considered as having been decided in favor of defendant. The issue between the parties is an important one, and not a question of such easy solution as some may think at first view. But I do not feel called upon to decide it on the present motion. It is enough for the present that the defendant is acting under apparent legal authority, "*primâ facie*" good; having the decision (*ex parte*, it is true, and therefore not conclusive) of what has been called a "*quasi* judicial tribunal."

THE COURT'S
OPINION.

It is possible that on a final hearing I may differ in opinion with them, and quite as possible that a higher tribunal might differ with me. The question is, therefore, at this time: "Ought I, under such circumstances, to issue a preliminary injunction, and give the plaintiff a remedy before he has established his right on a final hearing?" By doing so I may do an irreparable wrong to the defendant, in breaking up his trade or business. If the plaintiff should be injured by the continuance of defendant's manufacture, he will recover ample damages by the final decree of

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the court; as there is no allegation that defendant is insolvent, or likely to become so.

The motion for a preliminary injunction is therefore overruled. But the defendant is ordered to keep an account of all that is manufactured and sold by him.

I may here say for the information of the bar, that whenever a defendant presents a case showing a *bonâ fide* issue in fact or law, or, as in this case, a *primâ facie* right to continue his manufacture, founded on a decree of the patent office, and a consequent public grant, I will not grant a preliminary injunction, and thus issue execution before judgment. I will not decide the whole merits of a *bonâ fide* issue in fact, on *ex parte* affidavits, nor anticipate the final judgment of the court on the legal questions, as if they had been brought out on a demurrer.

The remedy by injunction, though necessary in certain cases to do complete justice, is nevertheless one which should always be cautiously granted, and more especially where it is demanded before a decree of the court on final hearing of the merits. If the defendant shows a belief that he has a just defence, and is not a wilful pirate of the plaintiff's invention, it should be a case of an evident mistake of law or fact, or both, in the defence which he sets up, which will justify the court in using their *festinum remedium*.

INJUNCTION REFUSED; BUT THE DEFENDANT ORDERED
TO KEEP AN ACCOUNT.

[AT TRENTON.]

CONSTANT v. THE INSURANCE COMPANY.

Though by the charter of an insurance company it is provided that "every contract, bargain, and other agreement," in execution of the powers of the company, "shall be in writing or print, under the corporate seal, and signed by the president, or, in his absence or inability to serve, by the vice president or other officer, &c., and duly attested by the secretary or other officer," &c., a parol agreement as to the terms on which a policy shall be issued, made by the president secretary, or other general agent of the company may, nevertheless, be enforced specifically in a court of equity, which, in case of a previous loss, will be by a decree for the amount which would be due upon a policy duly executed.

But a mere collateral agreement, which does not involve the execution of a policy of insurance, is not within the scope of the general authority of an officer or agent of such a corporation, and cannot be enforced.

The plaintiff, through a broker, applied to the defendants for an insurance on a boat for a definite amount, and was informed that "it would be taken." The defendants subsequently sent to the broker their own policy for a part, and the policies of three other companies for the residue, executed by an agent for the latter companies. The broker, on receiving the policies, wrote, in the absence of his principals, to the defendants, to say that he doubted whether the agency policies would be accepted, alleging as a reason, that the particular agent had not a *good reputation* for "*settling losses*," and added, "*I don't know whether it is your custom to guarantee the offices you insure in, or not; if you do, I may prevail on*" the plaintiff "to hold the policies." The secretary of the defendants in reply, wrote: "In handing the policies" to the plaintiff, "you can say that if the boat is not insured in *offices satisfactory* to him, we will have them cancelled; but, *though they are not re-insurances*, yet in case of loss we *feel ourselves bound for a satisfactory adjustment*. We deem the companies good, and *if any parties can settle with them, we can*." On the faith of this letter the plaintiff closed the transaction. One of the substituted companies afterwards became insolvent, and, a loss having occurred, a special action on the case was brought against the defendant: *Held*, (1.) That the secretary of the defendants had no general authority to bind them by a guarantee of the solvency of the substituted companies; and, (2.) If he had, his letter did not amount to this, but only to an undertaking for a satisfactory determination of the amount of the loss, and its apportionment between the insurers.

CONSTANT and others, including the captain of it, Bowman, were owners of a steamboat, upon which they were about to make an insurance. One Springer

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was a correspondent of the Allegheny Insurance Company of Pittsburg, the defendant in the case, and in the habit of getting customers for it, which he had authority to do, but he had no authority to make contracts for the company. Captain Bowman, for himself and in behalf of the other owners, applied to Springer, as agent of the Allegheny Company, to get an insurance of \$20,000 on the boat. Springer communicated with the company by telegraph, to know if *they* would take the risk, and received for answer "*that it would be taken;*" and Springer so informed Bowman, who requested Springer to write to defendants to take the risk. Springer did so, informing them of the names of the owners, and their respective interests. The defendants agreed to take the risk, and sent to Springer five policies of insurance, covering the risk of \$20,000: two of them of \$2,500 each, in favor of Captain Bowman, executed *by themselves*; one for \$5,000, in favor of Bowman, executed by the "*Pennsylvania Insurance Company;*" one for \$5,000, in favor of plaintiff, executed by the "*Quaker City Insurance Company;*" and the other for \$5,000, executed by the "*Commonwealth Insurance Company*" in favor of the remaining owner, one McGhee.

When these five policies were received the owners and the boat were absent on their voyage, and Springer wrote to the secretary of the Allegheny Insurance Company as follows:

"Your favor, together with the policies on the steamer, came to hand. I was very much disappointed in receiving the three policies from agencies. Altogether I am very much afraid, when the boat comes back, that the owners will not have them. They expected them to be taken in Pittsburg offices, and they were issued by Mr. Carrier, whose reputation

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for *settling losses* is not very good in this city. As far as my own knowledge goes, he never *settles without a law suit*. I don't know whether it is your custom to guarantee the offices you insure in, or not; if you do, I may prevail on them to hold the policies. I will keep the policies until they return, and do the best I can to get them to keep them; but I know the owners are very much prejudiced against the 'Commonwealth' and 'Quaker City' (they have agencies here), and if they will not keep them, I can only return them. I can say no more until the boat returns."

To this letter the secretary of the company defendant replied, as follows:

"In handing the policies to the owners of the boat, you can say, that if she is not insured in offices satisfactory to them, we will have them cancelled; but though they are not re-insurances, yet in case of loss we will feel ourselves *bound for a satisfactory adjustment*. We deem the companies good, and if any parties can *settle with them we can*."

When Springer presented the policy of insurance executed by the Quaker City Insurance Company, to the plaintiff, he objected to it. Springer then informed him of the contents of the letter aforesaid, upon which the plaintiff "gave his premium note for \$750, and the matter was closed."

It may be pertinent to observe, that by legislative enactment, insurance companies in Pennsylvania, except in cases of special charters, are "empowered to make, execute and perfect such contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case may require, and every such contract, bargain, policy, and other agreement shall be in writing or print, under the corporate seal, and signed by the president, or in his inability, by the vice president," &c., and that

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* Act of 2d
April, 1856,
§ 10, and Act
of 29th Janu-
ary, 1859, P.
L. p. 10.

subject to this act the Allegheny Insurance Company, the present defendant, held its charter.*

Soon after the insurance effected by the correspondence and acts already mentioned, the steamboat was lost; and the *Quaker City* Company having become wholly insolvent, this suit, a special action on the case was instituted at law, to recover the amount from the defendant, the *Allegheny* Company.

The facts as above stated, were found on a special verdict; judgment being to be entered for \$5,265.83, if the court thought that they made out a case for the plaintiff, otherwise for the defendant.

THE COURT'S
OPINION.

GRIER, J. To entitle the plaintiff to judgment on this verdict, he must show :

1st. That on the facts as found the secretary of the insurance company could legally bind the company to guarantee an insurance made by another insurance company.

2d. That such a promise or agreement was made, in such form as to support an action at law against the corporation.

By its act of incorporation this company could make insurance which would be legally valid only by a policy attested by the president, secretary, and the seal of the corporation. Yet, before such instruments are attested in due form, the president or secretary, or whoever else may act as a general agent of the company, may make agreements, and even parol promises, as to the terms on which a policy shall be issued, so that a court of equity will compel the company to execute the contract specifically;† and where the loss has happened, to avoid circuity of action the chancellor will enter a decree directly for the amount of the

† See Commonwealth Ins. Co. v. Union Mutual, 19 Howard, 818.

insurance for which the company ought to have delivered their policy, properly attested.

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The secretary of the company, in this case, replied by telegram to one sent by Springer, who acted as a broker or mutual agent of the parties, not that the defendants would themselves take the whole risk of \$20,000, but "that it should be taken." The company showed their construction of their undertaking by transmitting policies to the amount requested, equally divided among four insurance companies, as negotiated by defendants, and divided among the three several owners of the boat, according to their respective interests. The objection made by the insured was not to the manner in which the risk was divided, but that the agent of one of the companies (the Quaker City), had the character of being a very troublesome person to deal with in case of a loss which would require adjustment.

Assuming the representation of the secretary, that in case of loss "we will feel ourselves bound for a satisfactory adjustment," is an agreement to guarantee the solvency of the Quaker City Insurance Company, had the secretary authority to make a simple or parol contract to bind his principal to guarantee the solvency of another company? We think he had not. Every promise to make a policy of insurance under the seal of the company, and the terms on which it will be done, falls necessarily within the scope of the authority confided to such agent; but any other merely collateral promise or representation, which does not involve the execution of a policy of insurance, is not within the scope of his authority, as agent, because it is not strictly within the scope of the powers granted to the corporation.

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OPINION.

Whether the officers of the corporation could, by covenant, duly executed, but not in the form of a policy of insurance, bind the company to perform such a contract, we need not inquire. This is a suit at law, and the plaintiff must show a legal obligation, executed according to the forms required by the law, which confers the corporate powers on the defendant. And if it were a bill in equity, the chancellor would decree only a specific execution, to wit, the delivery of an instrument of writing, executed and attested according to law, and such as was within the powers of the corporation as provided by their charter.

But assuming that this parol promise, as stated in the secretary's letter, would support a suit at law against the company, is there a promise to guarantee the solvency of the Quaker City, or any of the three other companies who joined in taking this risk of \$20,000? The parties did not complain that the defendants would not take the whole risk on themselves, but had it negotiated and divided among other companies. The objection was not made to the solvency of any of the companies, but on the anticipated difficulties of *adjustment* in case of a loss occurring. The undertaking of the secretary is not that the defendant shall pay the amount of the loss, but to take the trouble of *adjusting* the loss with this captain's agent. This might be an easy matter for the defendants' officers to perform, as the very same adjustment would have to be made with and for themselves, and other companies who were not infested by such an agent.

The adjustment of a loss is defined to be the "settling and ascertaining of the indemnity which the assured, after all allowances and deductions made, is

entitled to receive under the policy, and fixing the portion which each underwriter is liable to pay.”

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OPINION.

Now, the direction of the secretary to Springer is to tender the policies, and if they are not satisfactory to the owners to cancel them; stating that they are not re-insurances, and that “we feel ourselves bound” not to pay the losses if the other insurers should be insolvent, but “for a satisfactory *adjustment*,” and adding, “we deem the companies good, and if any parties can settle with them we can.” Here is no guarantee. The whole length and breadth of this undertaking is a satisfactory *ajustment* of the loss, and no more.

JUDGMENT FOR THE DEFENDANT.

WASHING MACHINE CO. v. EARLE.

[DISINTEGRATION OF PATENT RIGHTS.]

A patentee may hold a close monopoly of his right, and if he does so, the court will restrain by injunction any persons using it. Or he may grant out his entire right. But he cannot divide his right into parts, and grant to one man the right to use it in its connection with or application to one class of subjects, and to another man the right to use it in its connection with or application to another class, to such an extent as that *purchasers* from any of these persons may not use the fabric purchased exactly as they like, and if they please in violation of what he has supposed were rights not granted by him.

Ex. Gr. Goodyear, the patentee of vulcanized India rubber, might have prevented any person from using his fabric for any purpose. But if he grants to A. the exclusive right to use it to make "wringers" only, and to B. the right to make "tubes" only, A. cannot restrain C., who has bought tubes from B., from converting them into "wringers," by any process whatever that he, C., pleases. Neither can Goodyear.

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STATEMENT.

THIS was a bill for injunction; the case being as follows: Goodyear was the patentee of what is known as vulcanized India rubber; an invention of undoubted originality, and which had been applied by him to a vast number of useful purposes. Among these were the following:

1. Making "wringers" for the different kinds of washing machines, now extensively used in hotels, public laundries, &c.; the office of these "wringers" being to press water, starch or other liquid mixture out of clothes, after they had been washed.

2. Making hose, pipe and tube; now used extensively for carrying water to fires, gardens, streets, mills, &c.; though used for many other purposes, as to convey sound, &c.

Not having great capital of his own, Mr. Goodyear, or persons who had bought his patent, had parcelled out the invention among many licensees ; granting to one person the right to use it for one purpose and to another the right to use it for another. To the complainants in this case, the washing machine company, he had granted the exclusive use of it in its application "to or in combination with all wringing, washing and starching machines," while to a company, called the Boston Belting Company, he had granted the use of it for making "hose, pipe and tube," and "*no further*;" the hose, pipe and tube described in one part of this deed of license being described in another, as "*conduit* hose—pipe and tube."

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That part of the washing machines above referred to as "wringers," were in fact iron shafts covered with India rubber. "The rubber"—to use the language of one of the workmen, "is constructed in rolls of a certain length, with an opening through the whole length for the metallic shaft, but much smaller than the shaft, so that the rubber, when the iron shaft is forced through it, being *thick*, grips and clings to it, and turns *with it*, instead of turning upon it; thus wringing the clothes as they are passed between the two rollers. The smallness of the aperture through the rubber, and the consequent force and closeness with which it clings to the iron, makes the shaft and the rubber, in effect, one entire solid roll."

The Boston Belting Company, whose right to make and sell "hose, pipe and tube," was not disputed, did not attempt to make "wringers." They made hose, pipe and tube alone. But a firm named Colley & Co., who had a patent of their own for making washing

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machines, bought this hose, pipe or tube, and out of it they made "wringers" for their washing machines, by cutting the hose into short pieces, running iron shafts through the pieces and fastening them to the iron with cement. The result was that the firm of Colley & Co. made wringers out of the thinner hose much like those which the washing machine company could out of the thick rubber expressly prepared for the purpose; good enough at any rate to undersell the washing machine company, who were bound to pay to Goodyear three cents a pound for the right of using vulcanized rubber in making *wringers*, while the belting company had the privilege of making *hose* for two.

The washing machine company now filed this bill, Goodyear being co-complainant, against certain agents or vendees of Colley & Co., praying a preliminary injunction against the sale of any washing machines of which the wringers were made by the use of hose.

For the
Complainant.

Mr. *Jenks*, for the complainant, cited great numbers of dictionaries of the English language, from Johnson down to Webster, and dictionaries of science, both Latin, French and English, to prove that each of the words "hose," "pipe," and "tube," meant essentially the same thing, and but one thing; *st.* a long *hollow* body, generally and in common parlance, cylindrical, and in the nature of a conduit for fluid; though neither of these qualities was of the essence of pipes or tubes. They might, he admitted, be of any substance, clay, wood, glass or what not, but that they should be hollow, and not solid, was of the essence of hose, pipes and tubes alike; and this point he abundantly made out on the authorities which he cited,

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with great research and learning. This being so, he admitted that as long as the fabrics of the Boston Belting Company were used for any purpose for which hose, pipes or tubes could, in their proper nature, be used—that is to say, so long as they were left hollow and as conduits, whether for water, air, light, steam or any other substance or element capable of transmission through them—neither Goodyear, Colley & Co., nor the washing machine company, nor any one else could complain. But here was an abuse; they take tubes, and permanently filling them up with an iron axis larger than the hollow of the pipe, and so stretching them, make them solid bodies. The case states that in the wringers of all washing machines, “the shaft and the rubber form, in effect, one entire solid roll.” Can a man purchase one kind of patented articles, cut them up—in fact *destroy* their identity and nature—and then use the fragments in a way never contemplated in regard to the whole thing while in a perfect state, and in a way which directly interferes with the reserved rights of the patentee, or with those to whom he has granted them? In the present case the expression is, “*conduit* hose, pipe and tube,” which shows plainly that the words “hose, pipe and tube,” were used in their strict sense, as pipes or channels for the conveyance of fluid.

Mr. *Gifford* for defendant.—The use of vulcanized rubber for making *conduit*, *hose*, *pipe* or *tubing*, was conveyed by the strongest terms; there is no restriction upon the use of them; and therefore the grant carries the right to use them for any purpose to which they are applicable. The grant conveys the right for

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conduit. The word conduit is a noun, and is defined by lexicographers to be "a conducting pipe or tube." The conveyance, therefore, does not stop with granting a right to *conducting pipe*, but after doing that, by the well-selected term "conduit," it goes on and conveys also the right to *hose, pipe* and *tubing*; showing that the intention was to convey the right to that form of rubber for all the uses to which it is applicable. The complainants, to avoid this result, are driven to the necessity of distorting the language by a violation of common rules of grammar, and calling the word "conduit" an adjective which in English is a noun, and was never anything else. But the complainants contend that the rollers in the wringing machines are not tubes; let us look at that.

1st. The complainants substitute in their treatment of the subject the aggregate thing, to wit: the roller in which the tube is used, and then ask whether such aggregate thing is a tube. A wagon is not a wheel, but a wheel was used in its construction, and such was a proper use of the wheel, and it is none the less a wheel because it forms a part of the wagon. So with a roller of the wringing machines. It cannot be called a tube in the aggregate, but nevertheless a tube was used in the construction of it, and does not cease to be a tube because it forms a part of the roller.

2d. A tube is *cylindrical*, and that is the form which is required in the wringing machines. It has this form before being used in that machine, and it retains that form when in and a part of it.

3d. A tube has a *caliber*, and a *caliber* is indispensable to put the iron rod through in its use in the wringing machine, as much as it would be to conduct water.

4th. It is therefore plain that the use of a tube or pipe to put the iron rod through to make a roller, is a direct and proper use of it, employing all the functions of a tube, and continuing to employ them, and without those functions no such use could be made of it.

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5th. The roller is composed of the *tube* of rubber and the *rod* of iron, and neither, after their union, ceases to be what it was before. The *rod* of iron is still a *rod* of iron, and the *rubber tube* is still a *rubber tube*, and in the aggregate they are a *rod* of iron through a *rubber tube*. When the man makes the roller, by putting the rod of iron through the tube, he is simply using, and in a useful and proper way, a rubber tube, and no other form of rubber would answer his purpose. He is not *destroying* the tube and using the material of it for some other purpose; on the contrary, he is *using* the tube by filling it with iron, which is as legitimate a use as if he were to fill it with water.

But the complainants say that in using the tube as a part of the roller, the tube is more or less *stretched*. If this be so, then it is simply a *stretched tube*. The tube is not destroyed. If filled with water it might be stretched; but who would contend that for that reason it had ceased to be a tube? Where a party has a license to make and sell an article of a certain form and function, if the purchaser, instead of using that form and function, *destroys* such form and function, and uses the material, to wit, the vulcanized rubber, to make a rubber article of a different form and function, and for which the form of the article purchased was not adapted, a very different question arises from any question in this case, and one which,

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it is submitted, is not necessary for the court to trouble itself with in deciding this case. To illustrate. If a man were to purchase India rubber boots of a party having a license only to use vulcanized rubber for boots, and after so purchasing them, instead of using the function of a boot, were to *destroy* that function by cutting them up in strips and using them for springs, or to make shirred goods out of, the question then would be, whether he would have a right to *destroy* the licensed form and function of the rubber instead of using that form and function, and to make some other form of a rubber article out of the material. But in this case there is no such question; the tubular form of the rubber is not *destroyed*, but it is *used*, and necessarily used, and continued in use; and such form and function is indispensable for the use to which it is applied.

The opinion of the court, which goes upon grounds not taken by either counsel, was given by

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GRIER, J. The right of the Boston Belting Company to manufacture pipes or tubes is not disputed. They pay a certain tariff per pound for the right to use the patented process: the material thus manufactured by them belongs to them, and not to Goodyear. Any covenant between them and him that they will not manufacture certain articles, may be valid as between the parties, but it does not run with the rubber, like a covenant on land. Colley & Co., when they purchased their tubes are absolute owners of them, and may convert them into rolls for wringers to their washing machines, or put them to any other use. They might have bought belting or overshoes, or any other article made by the licensees of Good-

year, and converted the material to any purpose that suited them. I may purchase a tobacco pipe made of this material, but I am not bound to smoke with it, and may convert it into an inkstand. The agreement between the licensees that A. shall make all the pipes, and B. all the inkstands, gives neither of them a right to the interference of a chancellor to compel me to smoke with my pipe, or to put ink alone in my inkstand. They cannot oblige me to use, in subservience to their arrangements, that which has become my property.

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But, say the complainants, although it is true that a "tube" is defined to be a hollow cylinder, yet it is generally used to convey water, and is called a water pipe. In addition, the Boston Belting Co. pay a tariff of but two cents; whereas, the complaining corporation pay three cents, and therefore ought to have a monopoly of making rollers.

The perfect answer to this is, that the complainants have no patent or exclusive monopoly of making rollers of vulcanized rubber. Goodyear, by virtue of his patent, might have manufactured it all himself, and sold it for such price as he could get; but his patent gives him no power to control the use which persons who purchase may make of it. Vulcanized rubber may be applied to a thousand purposes, from a tube to a steam engine, but this patent gives no power to the patentee to parcel out his one monopoly into a thousand sub-monopolies. He may make any covenant he pleases with his licensees, and by that means may dispose of his special licenses to great profit, but he cannot compel the public to notice or regard such agreements, or the right conferred or reserved by them. If his licensees do not perform their agree-

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ments, his remedy is by action against them on his covenants, and not by recourse to a chancellor to restrain third persons who have purchased vulcanized rubber from his licensees from using it, when it is theirs, for any purpose they please.

The bill does not complain that the machines sold by defendants are made out of rubber purchased from one who has pirated the patented process, but that the manufacturer who made them did not buy them from the complaining corporations on whom Goodyear assumes to have the power of conferring a monopoly to apply his rubber to that purpose. But the patent conferred no such power on him or them. Every person who pays the patentee for a license to use his process becomes the owner of the product, and may sell it to whom he pleases, or apply it to any purpose, unless he bind himself by covenants to restrict his right of making and vending certain articles that may interfere with the special business of some other licensees. The contrivance of the patentee to destroy competition may be valid, but the covenant binds only the parties to it. If a stranger purchase the product from one licensed to use the process, he need look no further, and may use it for his own purposes, without inquiring for or regarding any private agreement of licensees not to compete with one another.

In conclusion, the right of the Boston Belting Company to use the process in their manufacture of belting, packing, hose, pipe and tubing, is admitted. Consequently that company may sell their manufactures to whom they please, without inquiring the purpose of the purchaser, or imposing any condition on him as to how he shall use his own property.

As a corollary from these propositions, it follows that Colley & Co. may convert any of these articles, when purchased by them, into rollers for their wringing machines, without infringing the rights of the complainants, whose arrangements to create a monopoly cannot affect the right of Colley & Co. to do as they please with that which is their own.

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INJUNCTION REFUSED, WITH COSTS.

[AT TRENTON.]

LIVINGSTON & CO. v. JONES & CO.

[TREBLING THE DAMAGES UNDER THE PATENT ACT OF JULY 4TH,
1836.]

The Federal courts, sitting in equity, cannot, under the act of July 4th, 1836, § 14, treble the damages found by them for violating a patent right, as they may, when sitting at law, and on a verdict and judgment.

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APPEAL from a master's report, the case being thus :
Till within a few years past most of the door locks used in this country, were imported from England. It was an important object, therefore, to discover or invent some plan by which this article could be made more cheaply and better than the imported, notwithstanding the higher price of labor here. Such an inventor, who, by bringing his invention into market, could expel the foreign article, would evidently be a public benefactor, the article of door locks being one of immense consumption in this country. This object was in part effected by making the locks of cast iron ; but a difficulty in the way of these cheaper productions was found in the fact that door locks had to be made *right and left*, and a lock made for a right hand door would have to be turned upside down in order to be used on a left hand door, and *vice versa*. It became, therefore, a very important object to those who manufactured, and to those who dealt in this article, that this difficulty of right and left hand locks should be somehow obviated, and that every lock might be equally capable of use on right or left hand doors.

An American, named Sherwood—under whom the

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complainants claimed—was the first to invent a mode of effecting this object, and soon succeeded in establishing a manufacture at once cheaper and better than the imported. His patent was for “a new and useful improvement in door locks.” There was necessarily in Sherwood’s improved locks, a vast deal—much the greater part—of what had previously been in locks, and he claimed, of course, no merit for inventing *door locks* generally. “What I claim as *my* invention,” is the language of his application for letters, “is making the *case* of door locks and latches *double faced*, or so finished that *either* side may be used for the *outside*, in order that the same lock may answer for a right or left hand door.”

After Sherwood had obtained his patent and sold it to the complainants, which he did for \$600, the respondents, Jones & Co., conceiving that the invention patented was without originality, undertook to disregard the patent, and, during a term of two years and six days, did disregard it in a reckless and defiant way, as well as upon an extensive scale. And being able to sell for \$31 per dozen, locks which it cost but \$10.64 to make, their profits were large. The owners of the Sherwood patent (the parties making the present motion) having filed a bill some time since in this court and got a perpetual injunction and reference for *account*, obtained a final decree for \$13,282.92 damages; a sum, which though large, was still much less than what seemed to be shown as the profits of the other side. They now, therefore, moved to treble these damages, under the 14th section of the act of July 4th, 1836, an enactment which is in these words:

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"Whenever, in any *action for damages* for making, using, or selling the thing whereof the exclusive right is secured by any patent heretofore granted, or by any patent which may hereafter be granted, a *verdict* shall be rendered for the *plaintiff* in such action, it shall be in the power of the court to render *judgment* of any sum above the amount found by *such verdict* as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs."

The question now was, whether, assuming as proved, that the violation had been wilful and gross, the court, in a form of proceeding coming from a bill in *equity*, could treble the damages under the enactment quoted.

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Messrs. *Loomis & Stowe* against the motion.

The earlier decisions about patents were often characterized by a ruinous severity, but of late they have been modified and even changed; a change which, if not itself found in the case of *Seymour v. McCormick*,* may be traced to the wisdom exhibited in the resources of the jurist who pronounced the opinion in that case. The object of the patent laws is to promote the prosperity of the many by giving reasonable protection to the inventions of genius. But they have no further objects.

* 16 Howard,
48.

The complainants claim in the matter now pending before the court, a sum exceeding—say \$13,000—for two years' use of their discovery; and that this sum shall be trebled by the court sitting here in equity. That is to say, they demand that the defendant shall pay about \$40,000, for having *participated* in their simple discovery; a discovery for which they paid \$600. This claim appears rather formidable to men of moderate means and accumulations. It is an

amount equal to the acquisitions of many persons during a life of industry, and what would be usually regarded fair success. The collection of such a sum would ruin the defendants. The sum may appear trifling, and the consequences by no means momentous or important to those who can look complacently upon their overgrown fortunes, and calmly and unconcernedly upon the mode of acquisition, however reprehensible, and its consequences to others, however disastrous. It would pay the salary of a judge of the highest judicial tribunal for a term of many years. Such a claim exhibits neither a spirit of fairness nor a sense of justice. It betokens a thirst for acquisition, and an indifference to the mode and means of attainment. The tendency of such claims is to enrich one class of persons and impoverish another; to elevate one class to undeserved wealth, and depress another to unmerited poverty. But the act of Congress of July 4th, 1836, § 14, plainly refers to cases on the law side of the court. The expressions which it uses, "action for damages," "verdict," "plaintiff," "judgment," point plainly to common law suits, and are inapplicable to a proceeding in equity, which this is.

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Indeed, this point may be said to have been decided in *Sanders v. Logan*,* where this court said, "equity can inflict no exemplary or primitive damages as a court of law may;" and suggested to the counsel that where the object sought was neither "account nor injunction," "but only a decree for a certain sum of money as fixed, actual damages"—which is just what is sought by the request to treble the damages—"the party may have a better remedy in a suit at law."

* 9 American
Law Reg. 478.

But if the court sitting in equity could treble the

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damages, is this a case for so doing. In other words would it be done at law? Sherwood has not invented locks. He has, at most, invented but one part, or rather, improved one part of them, the face. The specification of Sherwood himself shows that what he claimed was only for making the "*cases of locks double faced.*" In the remaining parts of the locks—parts quite separable from the rest, and the profits on each one of which, as in Sherwood's case, can be computed separately—he claimed and could claim no right.

In *Seymour v. McCormick*, the Supreme Court decide that it is error to instruct a jury, that as to the measure of damages, the same rule is to govern, whether the patent covers an *entire machine*, or an *improvement on a machine*, and because such an instruction was given below, the judgment was reversed. In a part of the opinion they say :

"If the measure of damages be the same, whether a patent be for an entire machine, or for some improvement in some part of it, then it follows, that each one who has patented an improvement in any portion of a steam engine, or other complex machine, may recover the whole profits arising from the skill, labor, material and capital employed in making the whole machine, and the unfortunate mechanic may be compelled to pay treble his whole profits to each of a dozen or more several inventors of some small improvement in the engine he has built. By this doctrine, even the smallest part is made equal to the whole, and 'actual damages' to the plaintiff may be converted into an unlimited series of penalties on the defendant."

This language is conclusive.

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the damages.

Mr. *Bakewell* in support of the motion.

Assuming as the proof is, that the infringement of Sherwood's patent has been gross, the question is

whether the court, *sitting in equity*, cannot render a decree for more than the actual damage. It is true, that in *Sanders v. Logan*, it is said by the court, "that a court of equity can inflict no exemplary or punitive damages as a court of law may." The case was decided, however, on other grounds.

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As a general proposition, it is correctly stated, that in equity punitive damages are not recoverable; but the equity jurisdiction of the circuit courts of the United States, in questions arising under the patent laws, is peculiar, and the rules of equity applicable to ordinary cases do not necessarily apply. In equity, damages are not recoverable, excepting as incident to other relief, for the reason that there is an adequate remedy at law, and mere suits for damages, which could be recovered at law, are not sustainable in equity. But in relation to patent cases, the reason does not apply, since the statute expressly gives a concurrent remedy at law and in equity, and where the reason fails, the rule ceases to apply. The act of Congress of 24th September, 1789, § 16, provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law;" but this was merely adopting the long established principles of the English court of chancery. If this rule applied to suits under the laws of the United States, granting to inventors the exclusive right to their inventions, a patentee would be required to establish the validity of, and his legal right to, a patent in a court at law, before he could obtain a decree of a court of chancery to restrain the infringement of his rights. But in the United States, the circuit courts sitting in equity, do not, in patent cases,

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act as auxiliary to the courts of law, but have, by virtue of the act of Congress of 4th July, 1836, original and independent jurisdiction. They will not, therefore, direct an issue of law to test the validity of a patent, but will decide that question and the legal title of the plaintiff, if necessary, in an equity proceeding, as is said in *Sickels v. Gloucester Co.**

* Supra, p.
193.

In England, a patentee having sustained his patent at law, appeals to the courts of equity to obtain an adequate recompense for the violation of his patent privilege.† It cannot be, that in the United States, where the circuit courts have a larger and more complete jurisdiction over this class of cases, that the reverse is the case, and that a party whose patent is infringed has a better remedy in an action at law than he can have in a suit in equity.

† Hindmarch,
p. 305-6.

It is the practice in equity suits for infringement of patents in United States courts, to give the complainant the actual damages he may have sustained by reason of the infringement of his patent, without the verdict of a jury, or the intervention of a court of law, the amount being ascertained by reference to a master, and awarded by decree of the court; and yet, by examining the acts of Congress, we find no express provision for the recovery of damages for infringement, otherwise than by suit at law.

The 14th section of the act of 4th July, 1836, contains the only provision in relation to the recovery of damages in such cases; it provides, that "such damages may be recovered by action on the case in any court of competent jurisdiction." The 17th section of the same act provides, that "all actions, suits, controversies and cases arising under any law of the United States, granting or confirming to inventors the

exclusive right to their inventions or discoveries, shall be originally cognizable, *as well in equity as at law*, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court; which courts shall have power, upon a bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor, as secured to him by any law of the United States, on such terms and conditions as said courts may deem reasonable." Here the relief granted is an injunction to restrain the further infringement of the plaintiff's rights, and no allusion is made to the recovery of damages.

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The proceedings in equity cases under this act are not regulated by any express provisions, nor is the defence which the respondent is permitted to set up to the suit, in any way alluded to, either expressly or by reference to the like provisions regulating the action at law. The 15th section of this act provides, that the defendant may plead the general issue, and give the act and any special matter in evidence, of which notice in writing may have been given to the plaintiff or his attorney, thirty days before trial, &c., and throughout the act the proceedings contemplated are evidently adapted to a suit at law. But the decisions of the courts and the practice of the bar have been to accommodate the requirements of the act to equity proceedings, so that it has been held that if the respondent wishes in an equity suit to try the question of originality, he must set out in his answer the names of persons and places by whom and where the invention had been previously used, because the act of Congress, as was decided in *Orr v. Merrill*,* per-

* 1 Woodbury
& Minot, 376.

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emptorily requires notice of these facts in a trial at law or at most written notice must be given to the complainant a sufficient time before the hearing. So in *Wyeth v. Stone*,* one of the statutory defences against an action at law was held to be good in equity, although the statute expressly refers to these defences only in reference to an action which may be instituted at law.

These instances of the accommodation of equity proceedings to the provisions of the statute, which refer in terms only to actions at law, are cited for the purpose of sustaining the position that, by a like accommodation, the provision of the act of 1836, § 14, notwithstanding that it speaks of *plaintiffs*, and *verdicts*, and *judgments*, authorizes the court, in the exercise of a sound discretion, to make a decree in favor of a complainant in *equity*, to an amount exceeding the "actual damage" found by the master's report.

It is not necessary to seek in the ordinary proceedings in chancery for any authority for, or example of, such a decree; for neither is it warranted by the principles nor practice of the law, but derives its authority from the statute, and its example from the provisions of the prior patent laws of the United States.

The idea of compensating the owner of a patent, whose rights have been wantonly invaded, by giving him, in the shape of damages, more than the actual amount of his direct loss from the infringement, is no new feature of the present patent law alone. It is an idea which pervades the whole series of statutes on this subject. The patent act of 1790, § 5, allowed such damages (it does not say *actual damage*) as may be awarded by a jury, and the forfeiture to the

plaintiff of the *thing*, &c., unlawfully made or vended. By the act of 1793, § 5, the defendant forfeited *at least three times* the sum which the patentee usually charged as a license fee; and in the act of 1800, § 3, the forfeit was a sum equal to *three times the actual damage*; thus the law remained until the present act of 1836 was passed. This power of increasing the damages even to triple the actual amount, is left solely with the court; they certainly will not exercise it in a case at law, unless it is, in their judgment, fair and right, and necessary to fully compensate the plaintiff. There is no legal necessity imposed on the court to increase the damages in a suit at law, which they escape from in a suit in equity, and if it is equitable in the one case, it certainly is in the other. There is nothing in the form of the proceeding which should vary the exercise of a discretionary power like this. It is not as a *penalty* that this increase of damages is to be regarded, still less as a *vindictive* proceeding, but as a means of compensation for injuries and losses sustained by the aggrieved party which result from the infringement, and yet are not covered by the amount of profits received by the infringer. *Dean v. Mason et al.*,* comes near to an authority. That was a *bill in equity* for infringement of a patent. A decree was entered against the defendant, and it was referred to a master to take an account. The court say:

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* 20 Howard,
201.

"The rule in such a case is, the amount of profits received by the unlawful use of the machines, as this, in general, is the damage done to the owner of the patent. * * * Generally this is sufficient to protect the rights of the owner; but where the wrong has been done under aggravated circumstances, the court has the power, under the statute, to punish it adequately by an increase of the damages."

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In this suit in chancery the Supreme Court gives as a reason for restricting the amount awarded by the master to the actual damage, *that in such a case the court has the power to increase it.*

That this is a case where, *at law*, the damages would be trebled, appears to us obvious. The violation here has been reckless and defiant. But independently of this, the true measure of damage to the patentee is what he could have got from his patent if it had not been infringed: and this again is shown by the profits which the infringers have made.

There are cases, indeed, in which it would be unjust to estimate the damage, by reason of infringement, at the entire profit on manufacturing the whole article. The books of reports give us some such.

* 20 Howard,
392.

Thus in *Silsby v. Foote*,* the patent was for the use in a stove of an inflexible rod, which being acted upon by the changes of temperature in the stove, would regulate the draft. Here was an improvement which was but a slight variation from stoves known and used before. It was not the first regulator stove by any means, the patentee had no monopoly of regulator stoves, or of regulating the heat by a self-acting damper, and he was clearly not entitled to the profits on the whole stove. *Seymour v. McCormick*,† while

† 16 Id. 489-
491.

it decides that the inventor of an improvement in a particular part of a well known machine, cannot claim the whole profit as the measure of his damages, yet equally asserts that where the invention is on the whole article or machine whereof the patentee has the monopoly of the manufacture and sale, and desires to preserve that monopoly of the article, the rule is to give him the profits arising from the thing as a whole. The exceptions prove the rule. The invention in

this case is for a right and left hand lock—not for an *improvement* in right and left hand locks. It was a highly important object to those who manufactured and those who dealt in door locks, that every lock might be equally capable of use on right or left hand doors, and Mr. Sherwood was the first to invent a method of effecting this object. In other words, a right and left hand lock was a new thing, and was patented by Sherwood, the patent being now owned by these complainants. The lock is a unit, and the respondents cannot say truly that our patent is only on the case which encloses the works. In the cases in the reports, where the profit of making the entire article is not allowed as the measure of damage, there is a difference. In the regulator stove, for instance (*Silsby v. Foote*), the regulator of the peculiar kind patented is not essential, for another kind of regulator could be substituted, and the stove would still be perfect, and a regulator stove too, without infringing the patent. In a planing machine, where the patented feature is an improved kind of cutter; these cutters might be replaced with others of a different kind and the machine still remain; so of a patent on a peculiar kind of standard for a plow, or cut-off in a steam engine, and other cases, in many of which the patented feature might be removed and the machine still exist as a perfect and operative whole. But in this lock, the right and left or Janus-faced feature is everything; take away the case, and what remains are a few *disjecta membra*, useless, except when applied to the case. Further, it is not only necessary that the lock should be capable of looking equally well, when turned either side out, having two faces, each equally applicable to the outside, but the works must

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also be so constructed as to be capable of being used either way.

If, however, the court sitting in equity had no power of trebling the damages, then surely the rule of *Teese v. Huntingdon*,* which excludes *in actions at law*, counsel fees and other items of *actual* expense and loss caused directly or indirectly by the infringement, will not be applied in equity; and it will be proper to have the case referred back to the master, to ascertain the amount of such expenses and loss, of which he has taken no account in his report.

* 23 Howard,
2.

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GRIER, J. An examination of the facts and the principles of *Seymour v. McCormick*, relied on by both sides here, and a comparison of its facts with those presented by this case, will be necessary to a correct decision of the present controversy.

In the case quoted the patent of the reaping machine of McCormick had expired, but McCormick had obtained a patent for a small addition or improvement to this machine (a raker's seat). The machine with the raker's seat did not, as a whole, constitute a new machine or manufactured article, giving an entire monopoly in the market to the patentee and his licensees. The patentee had not the exclusive right of making or selling the peculiar reaping machine as one invention. He could not supply the market with machines with or without the addition of the raker's seat. On the contrary, his price for a license to make and use this improvement on the machine was ten dollars. The wrong done to McCormick was the non-payment of the license fee, which the respondent had previously paid. The court below had instructed the jury that the measure

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of damages for infringing the patent for this addition or improvement to a well known machine, should be the profit made on the whole machine. This was decided to be error. The court say that there cannot, in the nature of things, be any one rule of damages which will apply to all cases, and the mode of ascertaining the damages must depend on the peculiar nature of the monopoly granted.

If the inventor's profit consists neither in the exclusive use of the thing invented, nor in the monopoly of making it for others to use, but in having a general use of it by all who are willing to pay him the price of his license, then the non-payment of the license fee by the infringer is the only wrong done to the patentee. The only cases in which the measure of the patentee's damage is the amount of the infringer's profit, are where the invention is of some new machine, or a new form of any kind of known machine, which, as itself, a distinct species of machine or manufacture is more valuable, or can be put into market cheaper, so as to supersede or exclude other machines or manufactures of the same genus; and where the profit of the patentee consists in a complete monopoly of the right to make and vend the new machine or manufacture as a unit, and in the exclusion of all competition. In such a case the only measure of damage in a court of equity is the amount of profits made by the infringer, and it is in such cases that the injured party should seek his remedy in a court of chancery, where he can have a decree for an account, and an injunction to protect his monopoly. But it is plain that a patentee whose invention is only valuable because used by all who pay a license fee, and who suffers no other wrong than the detention

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of such fee, has fixed his own measure of compensation, and needs none of the remedies which it is the duty of the chancellor to give for his protection. An injunction would do him no good; an account is not wanted; the only remedy to which he is entitled being a judgment for a given sum of money, with interest, a court of law is his proper resort; where also he may recover a penalty to the extent of treble damages, if the judge sees fit to inflict it. An injunction is never granted vindictively, but only when it is necessary to protect the rights of the complainant. An account cannot be required unless where a knowledge of the profits made by the infringer is necessary to a just determination of the controversy.

Although the statute gives original cognizance of patent controversies equally to courts of equity as to courts of law, and consequently, the chancellor may decide a controversy as to infringement without requiring a previous verdict in a court of law, yet it does not follow, that all distinction as to the remedies granted by each tribunal is to be abolished: a court of law cannot issue an injunction, nor a court of equity take jurisdiction to enforce a penalty, or merely punitive damages. Each court will give the remedy peculiar to its own functions. The remedies of a court of chancery are by injunction and account; penalties and vindictive damages can be recovered only in courts of law. The case of *Dean v. Mason* was one where the monopoly of use of a patented machine (a planing machine), in a particular county had been infringed. It is said in such a case, that, "the rule of damages is the amount of profits received by the unlawful use of the machines, as this, in general, is the damage done to the owner of the patent." The

court afterwards say, "Generally this is sufficient to protect the rights of the owner. But where the wrong has been done under aggravated circumstances, the court has the power, under the statute, to punish it adequately by an increase of the damages." This is no doubt correct as a general proposition. But the question whether a chancellor would interfere to punish parties by assuming the functions of a common law court, and whether the remedies given in a court of chancery should not be such as are peculiar to that jurisdiction, was not before the court.

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MOTION REFUSED.

FRENCH v. BREWER.

[OIL MINING RIGHTS: BILL FOR PRELIMINARY INJUNCTION.]

Deeds, however apparently formal, must be interpreted upon a view of the whole paper, and in subservience to what appears to be the scope of them, especially when it appears, as it often does in the United States, that the instrument is the production of an ignorant scrivener who has used legal terms without exact knowledge of their legal import. The technical rules of the old English books must be applied with intelligence; and only after an examination of the whole deed.

In cases of obscure instruments, especially on motions for a preliminary injunction, a court may inquire into the actual state of the knowledge which the parties to it had upon the subject of it; and where it involves questions of science, may refer to the state of public knowledge or that of learning at the time the deed was made.

Where the meaning of a deed is not absolutely clear, and the rights of the party claiming under it are disputed, a preliminary injunction will not be granted to restrain a person acting in violation of alleged rights, unless it is plain that irreparable injury is likely to be suffered. And where the defendant is laying out his own money in such a way that the complainant, if his construction of his deed be true, can ultimately get the benefit of it all, and where the defendant has not received from his outlay any return as large as the outlay itself, the injury will not be regarded as irreparable.

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BILL for an injunction, the case being thus: In the beginning of the present century, a stream was discovered not far from Meadville, in Crawford county, Pennsylvania, upon the surface of which, as of the smaller rivulets running into it, a species of oil frequently flowed; and to such an extent in some places, that when a candle was applied to the surface, the oil would ignite and blaze in a lambent flame on the creek itself. The people in the neighborhood of the stream, which was now called "Oil Creek," were aware of this peculiarity of the water; but the population thereabouts, was sparse in those days, and no

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great deal of mineralogical science was applied to the subject. The schoolmaster called it a "phenomenon," and this was regarded by the learned as a full and lucid explanation of the matter. The Indians, it is said had known this peculiarity of the stream, and applied the oil to surgical purposes, in the cure of external injuries or sores. The early white settlers used it in the same way, and also for different domestic or farm purposes. It flowed along with the water—on its surface—but the descent of the water being rapid, and the stream itself shallow, the only mode in which the people could get the oil separated from the water was by making little ditches or pits along side of the creek, and drawing off a certain amount of the water of the stream into them. This being left in a state of stagnation, the oil would soon collect in a coagulated form on the surface; when the women would go out, and inserting *blankets* under the water, raise them and secure the oil; the blankets being porous enough to let the water flow through them, but sufficiently close to retain, till they could empty it, the thicker substance of the oil.

Enough oil was obtained in this way, to make it worth while for the farmers and others in the neighborhood occasionally to go through this somewhat laborious process of getting it; but the oil never became in those days a subject of much value or of any commerce. Sometime, however, in the spring of 1858—the date is important—a person named Edwin Drake, residing at Titusville, a town on this creek, conceived that the oil must be a mineral substance, some way connected with coal formations; and that it probably came from a great depth below the creek, and through some fissures in the rocky formation, from coal strata

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on the adjoining lands, and therefore that it could be far better got by boring on the lands themselves. His conjecture proved to be right, and led the way to a branch of industry which in five years has, in western Pennsylvania, become an immense one, covering whole regions from Lake Erie to the Ohio, with operations in what is now called "Petroleum" or "Rock Oil."

In November, 1855—that is to say, two years or more *before* the discovery and labors of Drake, as thus recorded, the defendants, being then owners in fee of 160 acres of land on Oil Creek, including a certain island particularly well situated for gathering oil in the old way—while the complainants owned 105 acres on the same creek, adjoining this tract of 160 acres, but *lower down* on the creek than the defendants', made to the complainants a deed, somewhat peculiar in its expression. It ran thus :

"The said parties of the first part," (the now defendants) "do hereby lease and by this indenture have leased to the said parties of the second part," (the now complainants) "their heirs and assigns, for the full term of ninety-nine years, all the oil or paint on or BEING ON ANY of the lands," &c. (of the defendants), "with the privilege of"—the deed went on rather oddly to say—"of going on to and of taking away all or so much of the oil or paint at any time and at all times, as is consistent with the pleasure or interest of the said parties of the second part, on the following described lands ONLY, viz. :"
[Here followed a description of certain lands of the defendants.] "RESERVING to the said parties of the first part" (that is to say, to the now defendants, who had large mill works near this land), "their heirs and assigns, the right and privilege at all times to pass over and repass with teams, wagons, sleighs, carts, sleds; or any other vehicle, to and from their mills, over said ground or lands, together with all ground or land necessary for yard and mill privileges and mechanical purposes: And the said parties of the second part, their heirs and assigns," the deed proceeded, "are not in any case

to approach with their work or excavations so as to endanger or obstruct in any manner their mills, races, dams and ponds, or to impair or obstruct their lumbering and mechanical business as they do now or may hereafter exist."

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It was made plain enough in behalf of the complainants, that between the date of the deed just mentioned and the time of Mr. Drake's discovery, the defendants never attempted to claim any oil on or about this tract of 105 acres—the tract on the upper part of the creek—but that in May, 1860, finding that Mr. Drake had discovered a new mode of getting at the oil, and of making a great subject of commerce out of it, *they too*, by numerous workmen and undertenants had been sinking wells and carrying away the oil also; *although, as yet, all the oil that they had got had not paid off the cost of sinking the wells.*

The complainants—citizens of Connecticut, who were largely engaged in boring for oil—finding that the defendants were interfering with the monopoly of the substance which they had got through Mr. Drake's discovery, now filed a bill, praying an account for the oil that the defendants had already got from the 160 acres, and an injunction against taking any more, in any way, and especially by the process of boring wells. The bill alleged that the complainants had expended large sums of money in the development of the oil on the 160 acres, and of the means and methods of obtaining it from the land, by reason of which the premises aforesaid, and the right and title thereto, and interests therein of the complainants, had been greatly increased in value; so that they were now believed to be worth \$100,000 more than before such expenditure and development; that the rights and claims of the complainants were acknowl-

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edged until the expenditure was made, and the development had resulted in increasing the value. It complained in substance, further, that respondents occupied the 160 acres to the exclusion of complainants, and had excavated and bored numerous wells thereon, and taken the oil therefrom, "*thereby*" preventing complainants from taking and using it, *and preventing the same from oozing and flowing down the creek* from the tract of 160 acres to that of the 105 acres below it and belonging to complainants.

The testimony showed that the respondents had bored wells, and had a large number of hands employed in boring others. But there was no evidence that they have meddled with or sensibly affected the flow of the oil *down the creek*, or the collection of it by complainants, either on their own land or on the island. Nor was there any proof that the oil raised from the upper works, flowed in any way, either above or below the surface, to the lands below, of the complainants, or to the island where they were permitted to enter and make pits: whatever might be the inference which a geologist, on looking at the soil, would draw if the wells were very numerous, and near to the stream.

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Mr. *Church*, for the complainants, rested strongly on the general expressions of the deed, and on the old and technical rules as given in Coke, Shepherd's Touchstone and other books, about interpreting them; citing authorities very fully. This he said was a deed of indenture, leasing for ninety-nine years "all the oil and paint lying on or being on *any of the lands*," &c. It was therefore an original conveyance, absolute in character during the time limited therein. The grant

of the oil is complete and explicit. It conveys a corporeal right; and, by the terms of the deed, is assignable. The language of the deed in *Caldwell v. Fulton*, 7 Casey, 475, is, "the right and privilege of digging and taking away stone coal, to any extent, the grantee may think proper to do, or cause to be done, under *any* of the land now owned and occupied by the said grantor, provided, nevertheless, the entrance thereto, and the discharge therefrom, be on the foregoing described premises;" that is, on a certain 16 acres granted in fee by the same deed. The Supreme Court of Pennsylvania held that this was a grant of the coal corporeal, and not of a mere privilege incorporeal, and was exclusive of the grantor. The grant here is of "all the oil on *any* of the lands of the grantors, in," &c. The instrument is that of the grantors, and is to be taken most strongly against them. The restriction, if a restriction is meant in the words—"With the *privilege* of going on and taking away all or so much of the oil or paint, &c., on the following described lands only"—is repugnant to the preceding grant, and void. The first expression is plain in its meaning; the later words are ambiguous. Under those circumstances the latter, even if they were apparently restrictive, would be inoperative; for certainty previously expressed, is never to be restrained by subsequent ambiguity.

But, by a slight straining, we can reconcile these different parts, and are bound to do so, if we can in any way. "An exception in a deed," (says *Shepherd's Touchstone*, 75,) "must be of something separable from that which is before expressed." And hence the words subsequent to the lease or grant, of "all the oil on *any of the lands*," should be made to apply

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—as they can be made to apply—to gathering it on that part whereon the right to the use for lumbering business is reserved to the grantors. In fact, this later clause being new, means something new; something by way of addition to that already granted. “With,” in this connection, means “in company with”—“as an appendage.” The later words are in fact disjoined from the earlier and complete grant: and they refer to the later part of the subject spoken of; that is to say, to the rights reserved about lumbering. This mode of construction will harmonize the apparently conflicting parts of the instrument.

The fact that the plan of raising oil by wells had not been discovered in November, 1855, when the deed was made, is unimportant. The deed is to be interpreted by its plain words; according to what it says; and who shall declare that it was not in view of the very purpose of trying the experiment, which Drake did try, that the grant was obtained? The discovery was made soon after the deed. The conjecture made by Mr. Drake, as to the source of this oil, was one natural to be made; and certain to be made by some one, as the region along this stream became, as it was rapidly becoming, populous, rich and enlightened. It does violence to the words to restrict them to the *old* way of getting oil by blankets. How was a right to get oil from the *creek*, in a blanket, a grant of “*all* the oil and paint lying or being on *any* of the *lands*,” &c.? Whatever the deed does or does not mean, it is impossible to say that it means *nothing more* than that the complainants might practice the old fashioned and half savage operation of the blanket. It is a dangerous rule—one, certainly, having no place among Blackstone’s—by which to construe *deeds*, to specu-

late upon the supposed state of the scientific knowledge of a purchasing party. It would be a pre-eminently dangerous one in regard to the purchase of mining rights, where science is constantly advancing from conjectures to certainties, and enterprise is continually based upon speculation—upon “inklings”—which the purchaser carefully conceals. The present plaintiffs are citizens of Connecticut, and probably made the purchase under scientific counsel, and with a strong suspicion of what has turned out to be a fact.(A)

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For the
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Assuming that this part of his case had been made out, Mr. *Church* argued without difficulty in favor of an injunction.

Messrs. *McCalmont* and *Kerr* for the respondents, contended that the deed was too obscure for a court to interpret it in this form of proceeding, and in a way which would be so injurious to the defendants; as the grant of an injunction would plainly be.

Against the
Injunction.

GRIER, J. The instrument on which this controversy arises, is anomalous in character. It is the work of a conveyancer ignorant of legal forms, and wholly unlearned in the law. It does not profess to sell or convey absolutely all the mines of paint or petroleum lying in or under the 160 acres. If it had done so, the title to the minerals would necessarily include a right to enter on the land of the grantor to take them away. A lease for years is a contract for the use of lands or tenements; and although it may be for a full consideration paid down, and reserve no rent to be paid in future, yet it contemplates a temporary use of

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(A) Such, as afterwards appeared, was the exact truth.

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the thing leased, whether it be a farm or a mine, and a return of the possession thereof to the owner or reversioner. Suppose it was a lease for one year to "take at all times *so much of the oil as is consistent with his pleasure or interest,*" would this confer an absolute title to all the oil, whether taken within the year or not? The great and governing rule in the construction of all contracts or deeds is to ascertain the intention of the parties, and this must be by a careful examination of the whole instrument. This is more especially necessary in a country where every man is his own scrivener, and freely uses legal terms without a knowledge of their true or precise legal import. It is no doubt a just rule of construction, that restrictive words, repugnant to an absolute grant or sale of a thing, may be construed to be inoperative, because they contradict the clearly expressed terms of the deed, as to the nature and extent of the estate granted, and render it ineffectual for the purpose clearly intended by the parties. But we must first examine the whole instrument, all its parts, and each provision or covenant contained in it, to ascertain the intention of the parties, before this rule can apply. We should ascertain the nature of the thing which is the subject of the grant, and the state of knowledge of the parties. The rules of construction adopted with regard to leases or conveyances of coal mines or other solid mineral substances, may have little application to this newly discovered mineral liquid. There would be no necessary contradiction in the terms of a lease of coal mines, that the lessee might take *all* the coal, or so much as he pleased, under a tract of 100 acres, while it prohibited his entry on all but 10 acres for the purpose of sinking the shafts for his mines. It may be

true that wells sunk on the 105 acres or on the island, might or might not drain the oil from the whole 160 acres. As to this fact, the parties have furnished no evidence whatever, and it is probably a fact not yet ascertained or known. We must have reference, in interpreting this obscure paper, to the state of knowledge of the parties, and of the whole country, with regard to the subject matter of this contract, and the mode in which this mineral oil was obtained. When the instrument was executed, the only method known by which the oil could be obtained, was by digging trenches, and raising the oil by blankets from the water. The natural flow of the creek would carry the oil on its surface from the lands of the respondents to those of the complainants, which were *lower down*; unless the oil was arrested above. That part of the 160 acres called the island was conveniently situated for making the trenches to gather the oil as it came down. Recalling, as the reporter's statement gives it to us, and as the affidavits disclosed it, the knowledge of the parties and the people on the subject of this contract, and the fact that till the time of Drake's discovery the oil had found its way to the surface through chance fissures in the strata under the stream, and that it was not till 1858 that boring to find the source of the oil was practised—much of the difficulty in the construction of this instrument, by reason of apparent contradiction in its covenants, vanishes.

It is not necessary, however, nor perhaps proper to express any conclusive opinion as to the construction and effect of this instrument before the final hearing. It is sufficient, for the purpose of the present motion, to say :

1. That it is, at least, doubtful whether the com-

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plaintant's deed conveys in absolute estate all the oil under the respondent's lands, or only a license for a term of years to collect what flowed on the surface of Oil creek ; or whether parties could be said to contract about a subject matter of which both were wholly ignorant. *Colwell v. Fulton*,* cited by Mr. Church, has no similarity to the present. It is no doubt true, that minerals beneath the surface may be conveyed as corporeal hereditaments, and thus severed in title from the surface soil ; and there is no doubt that livery of seizin is unnecessary either here or in England since the statute of uses and the introduction of deeds of bargain and sale. But it might nevertheless be a sufficient reason for construing an instrument to take effect as a *grant* of an incorporeal hereditament, which requires no livery of seizin, that it contains no apt technical words to grant, bargain or sell absolutely a corporeal hereditament, or an unsevered portion of the grantor's land.

*7 Casey, 479.

Since that decision, a court, administering the law of Pennsylvania, might be justified in construing a grant of "the full right, title and *privilege* of digging and taking away stone coal to any extent" from the land of the grantor, as an absolute bargain and sale of the coal to the grantee. But we must construe the deed before us *ex visceribus suis* ; having reference to the peculiar nature of the subject matter and the knowledge of the parties with regard to it. With these facts in view it is at least doubtful whether the parties intended by this anomalous instrument to grant anything more than a license for a term of years to take all the oil floating down the creek, and to use the island for that purpose, in consideration of the grantee's license to them to have a mill race over their

land. A final decision of this question must be reserved till a final hearing of the case.

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2. There is no evidence to support the charge of the bill, that wells bored by the respondents prevent the oil from flowing down the creek, or that they have interfered in any way to arrest such flow or hinder the enjoyment of any of the complainants right on the island. We do not know, and are not informed by the pleadings or evidence, that the oil taken from the rocks above would ever have flowed (above or below the surface) down to the island, or to the one hundred and five acres below.

3. The oil taken by defendants thus far has not compensated the expense and trouble of boring the wells. An injunction now would compel the respondents to cease their business and discharge a large number of hands. It would inflict a certain injury on the respondents, while the benefit to the complainants, like their title, is uncertain. If they recover on final hearing, the new wells will be a benefit to them, and not an irreparable injury.

INJUNCTION REFUSED.

THE UNITED STATES *v.* MARKS'S SURETIES.

[SURETIES OF POSTMASTER: ACT OF CONGRESS, MARCH 3, 1825.]

Under an act of Congress which provides that if defaults in rendering quarterly accounts is made *at any time* by a postmaster, and the United States shall fail to institute suit for two years after such default, then the sureties shall not be held liable, the sureties of a continuously defaulting postmaster are wholly discharged, unless the United States sue within two years after the *first* default made. Institution of suit within two years from the time when the *last* default was made is insufficient.

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AN act of Congress which makes the sureties of every postmaster liable for his omissions to render accounts quarterly, provides, nevertheless, that "if default be made by the postmaster aforesaid, *at any time*, and the postmaster general shall fail to institute suit against such postmaster and his sureties *for two years* from and after *such* default shall be made, then, and in that case, the said sureties shall *not be held liable* to the United States *nor shall suit be instituted against them.*"*

* Act of 3d
March, 1825.

With this law in force, Marks, a postmaster of the United States, committed a default for the quarter ending 31st of March, 1856, and also for every succeeding quarter down to June 30th, 1860; not rendering in all this interval of more than four years a single account.

The present suit was brought June 5th, 1861; that is to say more than *five* years after the first default, though rather less than one after the last.

The question was whether the provision of the act

of Congress barred the recovery only of the several balances accruing more than two years before the institution of the suit, or whether it barred *all* recovery whatever. The District Court held that it did not bar all recovery; and that for any defaults which had been made within two years before the suit was brought a recovery might still be had.

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GRIER, J. This case comes not only within the letter but also within the spirit of the proviso. "If default be made *at any time*," and suit be not brought in two years, the sureties "shall not be liable to the United States, nor shall suit be brought against *them*." These words are plain. The spirit of the act is equally plain. The reason why statutes of limitation should not run against government is founded on a theory, that *it* cannot be guilty of laches; and would be apt to suffer if the neglect of its servants to prosecute its claims should be permitted to release a surety. But the proviso in the present act is made for the exact purpose of protecting innocent sureties against the results of official laches. Where a deputy postmaster becomes a large defaulter and is afterwards permitted for four years to continue in office without rendering an account or paying the balance due, there is gross negligence on the part of the officers of the general post-office, and it would be unjust to the sureties to make them the victims of it. It is the evil from which the proviso was intended to protect them.

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Jones v. The United States,* which might seem to sustain the claim of the United States, turned chiefly on the appropriation of payments. A running account had been kept and the balance on the last quarter was within the two years. So that the question now

* 7 Howard,
682.

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* 1 McLean,
217.

before us did not arise. On the other hand, in the *Postmaster General v. Fennell*,* McLean, J., has given the construction to this act, which I think it fairly demands. He observes that "the statute was adopted for the benefit of securities and to excite the utmost degree of vigilance in the department."

Let the judgment be reversed and a *venire de novo* issued, if requested by the plaintiff below.

[AT PITTSBURG.]

THE ADMIRAL.

[PRIZE: BLOCKADE: FALSE CLEARANCE.]

Where a vessel sailed from Liverpool, England, for the port of Savannah, then blockaded by the United States, as a rebel port, with orders to seek the blockading squadron (if the blockade was found to exist), and procure an endorsement on her register that she had been warned off, and then to proceed to St. John's, New Brunswick, but with a clearance on board expressing *St. John's* as the sole port of destination, it was held (the vessel having been captured off Savannah), that she was confiscable for a violation of the blockade of that port.

Seemle, That the President's proclamation of the 19th of April, 1861, announcing that he had set on foot a blockade of the ports within the State of Georgia and other States, does not entitle a vessel, which has full knowledge of the establishment of the blockade before she enters upon her voyage, to a warning by one of the blockading vessels, or an endorsement of a warning upon her register, when taken in the act of entering one of the blockading ports.

THIS was a libel in prize, filed by the United States against the ship "Admiral," her tackle, apparel and furniture, and the goods, wares and merchandise laden thereon; and came here on appeal of her claimants, British subjects, from the District Court condemning her.

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The facts appearing from the evidence in *preparatorio*, and the ship's papers, were as follows:

1. That the said vessel was of English ownership, and the property of the claimants.
2. That she cleared from Liverpool in September, 1861, with a cargo of salt and coal; the whole being of British growth, and loaded and owned by British subjects.
3. That the *clearance* at Liverpool expresses *St.*

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John's, New Brunswick, as the *sole* destination of the vessel.

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4. That the real destination of the vessel at the time of her clearance, was to Savannah, Georgia.

[This fact appeared from a letter of instructions from the owners of the ship to the master, dated Liverpool, 12th September, 1861, in which they say as follows :

"We hope you will have good start of channel, and thus make a good passage out. The enclosed charter with Messrs. W. & R. Wright, will show you the nature of the voyage. These gentlemen, like many others, hold the opinion that this unfortunate contest cannot last long, it being so obviously the interest of both parties to bring it to a close. This being so, and they being very wishful to have cargo of pitch pine from Savannah to St. John's, so soon as the port is opened again, for their new ship, 'St. John's River,' is our great reason for their making it a condition in taking the ship, that she should go off Savannah, so that if possible they might have the very first shipment of timber. Of course, in calling off, you will endeavor to meet the blockading ship (if the blockade is found to exist still), and then get the officer in command to endorse on your register that the ship has been warned off. This will be all that is necessary for us as owners of the ship, to justify your departure for St. John's, and there consigning the ship to Messrs. W. & R. Wright, to whom, in the meantime, we will write respecting you.

You will distinctly understand, therefore, that you run no risk whatever with the ship, but rather endeavor to satisfy yourself as to blockade, and then find out the man-of-war, report yourself and get the register endorsed.

You will no doubt speak some vessels when approaching the American coast, so as to ascertain exactly the state of matters, and be guided thereby in such way as not to infringe the blockade regulation. Hoping in good time to hear from you,

We are, dear sir," etc.

It also appeared from the answer of the master to one of the interrogatories in *preparatorio*. He says: AP'L SESSIONS,
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"The captured vessel sailed on her present voyage from Liverpool, England. She cleared for St. John's, with orders to go to Savannah, seek the blockading squadron, if any there was, uncertain whether the blockade still existed, and if so, then proceed to St. John's."

7. The following is an extract from the claim filed by the master:

"When I was about thirty miles off Tybee Island, under the British flag, and standing towards the land off the port of Savannah, and without any knowledge whether a blockade existed, or whether it had been raised, and while I was looking for a blockading vessel, or some other vessel, of which I might inquire whether a blockade existed, I was hailed and boarded by an officer from the United States Steamer 'Alabama.'"

8. The log showed that at the time of the capture the vessel was preparing to enter the port of Savannah.

Ashton, for the United States.

GRIER, J. I agree with Chief Justice Tindal, in *Medeiros v. Hill*,* "that the mere act of sailing to a port which is blockaded at the time the voyage is commenced, is not an offence against the law of nations, where there is no premeditated intention of breaking the blockade." Consequently, if, in the present case, the Admiral had taken out a clearance for Savannah, with the expectation that the blockade might be removed before her arrival, with instructions to make inquiry as to its continuance, at New York or Halifax, or other neutral port; and after having made such inquiry, had made no further endeavor to

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* 8 Bingham,
281.

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approach or enter the blockaded port, her seizure and condemnation as prize, could not have been justified.

But she presents a very different case. She was off Tybee Island, sailing for the blockaded port. She had made no inquiry on the way; had no reason to believe the blockade to be raised; and when arrested in her attempt to enter, she exhibits a clearance for St. John's, New Brunswick, a port she may be said to have passed, and a letter of instructions from the owners, to call off the harbor of Savannah, to "*endeavor to meet the blockading ship, and get the officer in command to endorse the register,*" &c., but to make no attempt to run the blockade.

The clearance is the proper document to exhibit and disclose the intention of a ship. The clearance in this case may not properly come within the category of "*simulated papers.*" But it does not disclose the whole truth. The suppression of a most important part, makes the whole false. It may be true, that in times of general peace, a clearance exhibiting the ultimate destination of a vessel, without disclosing an alternative one, may have sometimes been used by merchants to subserve some private purpose. But in times of war, when such omissions may be used to blindfold belligerents, as to the true nature of a ship's intended voyage, and to elude a blockade, the concealment of the truth must be considered as *prima facie* evidence of a fraudulent intention.

The Admiral, with a full knowledge that her destined port is blockaded, takes a clearance for St. John's, and is found a thousand miles from the proper course to such port, and in the act of entering the blockaded port. And when thus arrested, for the first time inquires whether the blockade has been raised.

A vessel which has full knowledge of the existence of a blockade, before she enters on her voyage, has no right to claim a warning or endorsement, when taken in the act of attempting to enter. It would be an absurd construction of the President's proclamation, to require a notice to be given to those who already had knowledge. A notification is for those only who have sailed without a knowledge of the blockade, and get their first information of it, from the blockading vessels.

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Now the primary destination of this vessel is to a blockading port. If the owners had reason to expect that possibly the blockade might be raised before the arrival of their vessel, and thus a profit be made, by their ability to take the first advantage of it, their clearance, in the exercise of good faith, should have made admission of the true primary destination of the vessel. If the truth had appeared on the face of this document, and if the master had been instructed to inquire at some intermediate port, and to proceed no farther, in case he found the blockade still to exist, the owners might justly claim, that their conduct showed "no premeditated intention of breaking the blockade." But when arrested in the attempt to enter a port known to be blockaded, with a false clearance, it is too late to produce the bill of lading or letter of instructions to prove innocency of intention. In such cases intentions can be judged only by acts.

The true construction of this proceeding may be thus translated: "Enter the blockaded port if you can, without danger; if you are arrested by a blockading vessel, inform the captor that you were not instructed to run the blockade, but had merely called

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for information, and would be pleased to have your register endorsed, with leave to proceed elsewhere."

If so transparent a contrivance could be received as evidence of a want of any "premeditated intention to break the blockade," the important right of blockade would be but a *brutum fulmen*, in the hands of a belligerent. "It would" (says Lord Stowell), "amount in practice to a universal license to attempt to enter, and being prevented, to claim the liberty of going elsewhere."

In the cases where the stringency of the general rule established by this judge (but overruled in *Medeiros v. Hill*) had been by him relaxed as to American vessels in certain circumstances, the clearances were taken contingently, but directly for the blockaded port, in the expectation of a relaxation of the blockade, with instruction *to inquire as to the fact at a British or neutral port*. The clearance exhibits the *whole truth*, and the *place* of inquiry their *good faith*. In these most material facts this case differs from them.

DECREE AFFIRMED.

ROUSE v. THE INSURANCE COMPANY.

[INSURANCE: TIME POLICY.]

When insurance by a *time* policy is made on a vessel then in her home port, seaworthiness at the time of the ship's sailing is an implied warranty, though it would not be implied that the vessel was seaworthy at the moment of effecting insurance in case of a time policy made on a vessel, "lost or not lost," in a distant ocean, and of whose situation or condition the owner could know nothing at the moment he was making this insurance.

The distinction between a vessel in her home port, and which, before she sails, the owner has it in his power to render seaworthy, and one in a distant ocean, where neither party can know what her condition is, nor how far the seaworthiness which she had when leaving her home port, may have been destroyed or impaired by storms encountered after her departure, and over which the owner may have little or no control, is one which from motives of public policy should be strictly enforced.

The present case distinguished from *Small v. Gibson*, 14 Jurist, 368; 15 Id. 325; 17 Id. 1181; and 24 Eng. Law and Eq. 16; and from *Jones v. The Insurance Co.*, 2 Wallace, Jr. 278.

THIS was an action on a *time* policy of insurance upon a vessel lying at the time of the insurance made, in her *home* port; and by the terms of the policy to be employed as a passenger vessel between New York and Galveston, in Texas. Soon after the date of the policy the vessel entered upon her first voyage, *being unseaworthy at the time of leaving port*, and foundered at sea a few days afterwards.

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These facts having been found by special verdict, the question now was whether this unseaworthiness at the time of leaving port was a material issue in the case; or in other words whether, in a time policy like this, there is an implied warranty that the boat when she shall commence the voyages in which she is to be employed, will be seaworthy.

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The case having been submitted (by *G. P. Hamilton*, for plaintiff, and by *Loomis*, for defendant), on the authority and arguments of *Small v. Gibson*, and of *Jones v. The Insurance Co.*, hereafter mentioned, which cases were considered to embody all that could be said or had been decided on the point, it is necessary here to state the history of the decisions.

The question, whether there is an implied warranty of seaworthiness in time policies as well as in policies for voyage, was first directly decided in England, in *Small v. Gibson*, in the Court of Queen's Bench, A. D. 1849.* In that case the policy was on the ship *Susan*, "lost or not lost, in port and at sea; in all trades and services whatsoever and wheresoever, during the space of twelve calendar months." This case of *Small v. Gibson* came up on a demurrer to pleas, which do not show under what circumstances the assurance was effected; nor where the ship was when the policy issued;† though it is assumed in the argument of the case, that she was on her voyage. The court, in the present case, assumes that in the said case of *Small v. Gibson*, the ship was on a "distant ocean," and that "neither party could know what storms she had encountered after her departure," which fact was probably so; though not one involved in a judgment given on such pleadings. It was declared by the Queen's Bench, after argument, "that notwithstanding some dicta in Emerigon and other foreign jurists, the opinion of all the lawyers in modern times in England and America, is clear, that there is no difference between a time policy and one for a particular voyage, as to the implied warranty of seaworthiness."

On error to the Exchequer Chamber, this case was again argued and at great length,‡ and the judgment

* 14 Jurist,
368.

† See 24 Eng.
Law and Eq.
Rep. 46, per
Lord St. Leon-
ards.

‡ 15 Id. 325.

of that court given by Parke, B., reversing the decision of the Queen's Bench.

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The same question came before the Circuit Court for this circuit, at Philadelphia, in *Jones v. The Insurance Co.*, A. D. 1852;* the policy there being on the ship "lost or not lost," and the ship having, as a matter of fact, which was admitted though not on the record, been on a South American voyage. The court there adopted the decision of the Exchequer Chamber, in *Small v. Gibson*, as conclusive of the general question. But they remark: "It is true, *Small v. Gibson* does not decide that there is no warranty of seaworthiness at all in a time policy, or that there is not a warranty that the ship is or shall be seaworthy for that voyage, if the ship be then about to sail on a voyage; or if she be at sea, that she was not seaworthy when the voyage commenced."

* 2 Wallace,
Jr. 378.

This, it will be seen, is the question proposed in this case.

After the case in our circuit was decided, *Small v. Gibson*, was argued before the House of Lords,† and opinions delivered by seven judges affirming, and two for reversing the judgment of the Court of Exchequer Chamber. Afterwards the lord chancellor (Lord St. Leonards) and Lord Campbell, C. J., delivered their several opinions, concurring with the majority. But the question raised in this case was not there decided—as it was not necessary to the decision of the case before that court—but it is noticed by both the chancellor and the chief justice; the former saying, "If, however, a ship be about to sail on a particular voyage, and a time policy be effected instead of a voyage policy, I think, as at present advised, that the condition of seaworthiness at the commencement of

† See 2 Wallace, Jr. (n.) 281; 17 Jurist 111, and 34 Eng. Law & Equity Rep. 16.

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the voyage would be implied." Lord Campbell, on the contrary, says, "as at present advised, I should decide against the implied condition in all cases of time policies, and should be glad if it were understood that in all voyage policies there is, and in no time policies framed in the usual terms, is there a condition of seaworthiness implied." His lordship thought that any exception to this general rule in time policies would be "gratuitous and judge made;" and that it was "most desirable that in commercial transactions there should be plain rules to go by, without qualification."

The point therefore now before the court was a new one, both in England and here.

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GRIER, J. As neither the case of *Small v. Gibson*, nor that of *Jones v. The Insurance Co.*, decide that all time policies differ from voyage policies as to the implied warranty, but as each decide, only that the peculiar species of time policies then under consideration (which, as will appear, was the same in both cases), did not come under the rule applicable to voyage policies, it will be necessary to notice more particularly the covenants of those policies, and then examine the reasons given for not subjecting the assured to this implied covenant of warranty. For if the reasons for this exception of the time policies in the cases referred to, do not apply to the form and species of time policy now under consideration, the same rule ought not to apply.

The words of the policy in *Small v. Gibson*, are as follows: "on the good ship or vessel called the Susan, lost or not lost in port and at sea, in all trades and

services whatsoever and wheresoever, during the space of twelve calendar months, commencing," &c.

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The vessel was on a distant ocean; neither party could know what her condition was; if she had been seaworthy when she left her home port, neither party could know what storms she had encountered after her departure. The very object in effecting the policy is to pay a sum of money or premium for the purpose of casting upon another the perils and chances of the voyage during the period insured. If the ship was in existence at the time the policy was made, and in a storm, which dismantled her and rendered her wholly unnavigable, if she should go to the bottom the next day from leaks sprung before the date of the policy, it was evidently the intent of the parties that the underwriter was paid for taking upon himself the hazard. It is true a policy may be made on a ship from Calcutta to New York, and the owner may not know whether his vessel is seaworthy or not. But he knows that the master of his vessel will not leave Calcutta without putting his vessel in a condition to meet the usual perils of the voyage, and may well be presumed to warrant that fact with regard to his absent vessels. It is his bounden legal duty towards the mariners for the safety of their lives, and towards the merchants who load their goods, that the ship should be stout, stanch and strong, or in other words, seaworthy, before she commences a voyage either *from* or *to* a distant port. And it may most properly be implied, that in this contract with the underwriter the owner should be taken to warrant, as a foundation of the contract, that the ship shall be at the time of sailing from Calcutta, a seaworthy vessel. This rule is founded on policy, also,

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and courts should enforce strict compliance with it; otherwise the effect of insurance might be to render those who are protected from loss by the policy, exceedingly careless about the condition of the ship, and the consequent safety of the crew. Every vessel at the commencement of each particular voyage, requires appliances commensurate and appropriate to the ordinary risks of navigation during the particular voyage contemplated. In such a case there can be no difficulty in fixing the commencement of the risk, and making proof of the vessel's condition. But it is otherwise in a time policy like that in *Small v. Gibson* where the risk begins to run on a given day, wherever the ship may be. Whether the vessel is seaworthy or not is clearly one of the risks assumed by the underwriter, who has covenanted to bear a part of the risk of the owner for a given period.

The words of the policy in *Jones v. The Insurance Company*—the case I mean in our own circuit—were also “lost or not lost,” and in point of fact, the vessel, was on the main at the time when the assurance was effected.

But there are many policies of insurance which may be classed under the genus time policies, as distinguished from voyage policies, to which this course of reasoning would be wholly inapplicable. Let us take the case before us: It is true, it is a time policy, but it is not on a vessel in a distant ocean, or in parts unknown, where the parties have contracted without a knowledge of her situation, and with a premium paid for assuming the risk of her seaworthiness at the time by the underwriter. It is, in fact, but an agreement to insure the vessel in so many voyages between New York and Galveston, as she may choose

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to make within the year. If the insurance had been for twelve successive voyages back and forth, it would have been classed as a voyage policy, and the same implied warranty of seaworthiness would have applied to each, as if there had been several policies for each voyage. Can the fact that the number of voyages is indefinite, and may be more or less than twelve, if within the year, constitute a difference in the essence of the contract, because the accident of its form places it in the general category of a time policy as distinguished from a voyage policy?

Parke, B., in delivering the opinion of the Court of Exchequer Chamber, in *Small v. Gibson*, after stating the reasons why the implied warranty of seaworthiness, which it is the policy of the law to enforce, did not apply to that peculiar form or species of time policy, is careful to exclude the idea that this same rule would apply to all time policies; and very justly, as the decision in that case first established the doctrine, that any time policy should be held as excepted from the general rule as to seaworthiness.

Martin, B., in his opinion, delivered in the House of Lords, says, "If the record in this case had shown that the policy had been effected upon the ship upon her setting out from her original port, I am of opinion that from analogy to the case of a voyage policy, the warranty ought to be implied. If a time policy be effected on a ship about to sail from a given port on a voyage or voyages the ship must, in my opinion, be seaworthy at the time of sailing."

"Such a condition or warranty," says Platt, B., "is intelligible; its observance is practicable, and would be calculated to extend to the assured and the underwriter respectively every reasonable protection."

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Lord Campbell, C. J., admits there might be an exception to the general rule of implied seaworthiness where the time policy is effected on an outward bound ship in a port where the owner resides, but thinks it better to have a short, sharp rule, applying to all time policies—and thinks it more *expedient* that the rule should remain without any exception.

It seems not to have occurred to that learned judge that the exception to the general rule as to seaworthiness was, itself, a “*judge made*” one, *then* for the first time decided, and that to include other cases bearing no analogy to the one before the court (and to which the reasons given would not apply), within that exception, would be “gratuitous,” however it might facilitate the business of a court to follow “plain rules” without distinguishing between things that differ.

JUDGMENT FOR DEFENDANT.

[AT PITTSBURG.]

THE VOLUSIA.

[RIGHTS OF WHARF OWNERS AT PHILADELPHIA.]

In Philadelphia the owners of wharves have a right to use them for the unloading of their own vessels to the exclusion of others.

APPEAL in admiralty, from the District Court, the case being thus: SEP. SESSIONS,
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Lincoln & Co. were the lessees of a wharf on the Delaware, below Chestnut street, and proprietors of a line of Boston packets, that loaded and unloaded there. On a Saturday afternoon, 1847, one of their packets lying at the wharf, was covered by the Volusia, which lay alongside of her on the outside berth. The Volusia, with a cargo of fruit, had just arrived from Palermo. The Sulla, another of the line of packets, lay astern of, and at right angles with the packet at the wharf; with her head in. As the packet at the wharf was ready to sail, she swung out, stern foremost, and thus made a wedge-shaped vacancy between herself and the wharf, which presented an opening into which the Sulla was warped, and made fast to the wharf. As the departing packet swung out, she crowded the Volusia, of course, further from the place where she wanted to be, and effectually prevented her from occupying the inside berth, to cover and secure which she had placed herself at the outside berth. The harbor-master's aid was invoked by the consignee of the Volusia, who ordered the Sulla to give the wharf-place to the Volusia. Lincoln & Co.

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ordered the captain of the Sulla to retain his place. The harbor-master sued the captain of the Sulla before an alderman for disobeying his orders, and the alderman fined him \$25. On the fine being imposed, the Sulla left the wharf, and the harbor-master ordered the Volusia to take it, which she did. Lincoln & Co. then gave notice to the consignee of the Volusia, that their charge for wharfage was \$10 per day, which was \$8 per day more than the ordinary rate. Payment at this rate being refused, they libelled the Volusia.

It was urged that by the custom of the port, the occupation of an outside berth covers the inside, and that the Volusia acted under the orders of the executive officer of the port, whose directions are obligations. It was answered by the libellants that such a usage, if proved to exist (which was denied), was contrary to reason, and therefore should be abolished; that a merchant might insist upon the use of the inside berth, as essential to the exclusive dominion of his property, while, if to protect it, he was obliged to keep off vessels occupying the outside berth, he would be making his own wrongful act, and one prejudicial to commerce, his justification; and that he could not, for that reason, be presumed to assent to the principle of such an usage, or to yield his acquiescence to the notion that because he did not order off the outside vessel, he thereby surrendered his rights to his own wharf inside; and that the orders of the harbor-master were like the orders of any other officer, obligations so far, and no farther than they were *lawful* commands.

The matter having been argued before the District

Court, that court announced the following as its conclusions :

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1st. If a berth at any of the wharves be for the time occupied by a vessel, in which the owner or possessor of the wharf has an immediate interest, whether such a vessel be loading, discharging, or empty, no other vessel can claim a right to occupy that berth.

2d. If an adequate berth be vacant at any wharf it may be occupied at once with the owner's consent, otherwise the master or agent of the vessel must apply to the owner or possessor of the wharf for permission to occupy it, and if within twenty-four hours after such application the vacant berth is not filled by some vessel in which the owner or possessor of the wharf has an immediate interest, it may then be lawfully occupied for such time as the despatch of business may require, by the vessel for which the application was made.

3d. A vessel arriving from sea and desirous of discharging her cargo, may claim the inner berth at the wharf for a reasonable time, not exceeding six days, and may require vessels that are empty, or receiving freight, to take for the time the outer berth, unless between the 10th December and 1st March.

4th. The custom of the port gives a right to a vessel which has legally occupied an outer berth, to claim the next inner berth which she covers, whenever it has become vacant.

5th. The wardens of the port, represented by the master wardens and the harbor-masters, are the officers entrusted with the interpretation, application and enforcement of the legal and customary regulations of the port.

The District Court, therefore (KANE, J.), dismissed

SUP. SESSIONS, the libel, ordering, however, the respondents to pay
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\$2 a day.

ARGUMENT. The matter coming on this appeal before the Circuit Court, was argued by Mr. *Waln*, for the libellants, and by Mr. *H. M. Phillips*, contra.

THE COURT'S After advisement, GRIER, J., for the Circuit Court,
OPINION. reversed the decree, announcing the rule of this port to be, that no vessel has a right to occupy a wharf without the permission of the owner, unless twenty-four hours' previous notice has been given of an intention to occupy a wharf, which was vacant when the notice was made.

COHEN v. GRATZ.

[PRACTICE: FEIGNED ISSUE: MOTION FOR NEW TRIAL.]

A motion for a new trial of a feigned issue, directed by a court of chancery, must be heard on the merits of such issue singly, and cannot be affected by the equities arising on the bill and answer.

A motion for a new trial of such an issue, must be disposed of before the cause will be heard on bill and answer.

At a former hearing by Grier, J. an issue was directed by the equity side of this court, on exceptions filed to the master's report in the above case, for the purpose of determining the value of certain lands in Union and Columbia counties, Pennsylvania. The jury having found a verdict fixing a specific valuation, a motion was made for a new trial.

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Mr. *Budd* and Mr. *Tilghman*, for the complainant, urged that on such motion all the equities of the case were opened, and that in hearing it the court would take into consideration the general merits on bill and answer.

For the
Complainant.

Mr. *Reed* and Mr. *Williams*, contra, contended that the motion made for a new trial must be heard and disposed of, before the equities of the whole case will be considered.

For the
Respondent.

GRIER, J. In hearing the motion for a new trial of this issue, the court will confine itself to the ques-

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tion, whether the verdict of the jury is in conformity with the weight of evidence, and the law, on the particular issue submitted. The motion must be disposed of, and the verdict either confirmed or a new verdict taken and confirmed, before the court will hear the whole merits.

[AT PHILADELPHIA.]

McCOY v. WASHINGTON CO.

[MUNICIPAL RAILROAD BONDS AND COUPONS.]

A county may be sued in the United States courts.

Where bonds issued by a county in order to aid the construction of a railroad, covenant to pay to the holder thereof, the county is liable directly to the holder, who may sue in his own name, notwithstanding as between the railroad company and the county it is agreed that the company shall pay the bond.

So, too, the holder, if otherwise entitled to sue in the Circuit Court may sue there, although the bonds were issued to a railroad in the same State as the county was, and which, therefore, could not have sued in the Circuit Court. The plaintiff claims as holder, not as assignee.

The act of the Pennsylvania Legislature, of 12th April, 1851, authorizing Washington county to subscribe to railroads, having been declared constitutional by the Supreme Court of that State, is to be regarded in the Federal courts as constitutional, and the action of the county commissioners in conformity therewith is binding on the county.

The Constitution of the United States does not forbid States or counties from borrowing money and giving proper securities therefor, and such securities are not bills of credit within the meaning of the Constitution.

Nor is a law authorizing them, a law impairing the obligation of a contract, or one violating the fundamental principles of "republican government" within the meaning of that instrument.

Nor is the bill which finally becomes such a law, "a money or revenue bill" within the meaning of the constitution of Pennsylvania, which requires such bills to originate in the House of Representatives.

The coupons to coupon bonds payable to bearer are to be taken in connection with the bonds to which they are annexed, and though, not themselves, in the form of instruments negotiable by the law merchant, nor payable to any particular person, on his order, or even to bearer, they yet partake of the instrument to which they are attached, and when it is negotiable they too pass by delivery and become, from established usage, sufficient to establish the indebtedness of the county to the holder.

The possession of the coupons of coupon bonds, is *prima facie* evidence that the holder of them is holder of the bond, or at least was so when they were cut off, and as such entitled to receive the interest; and they may be declared on without in any way declaring on the bond from which they have been cut.

The effect of the bond cannot be varied by parol testimony.

Nor is it necessary in a suit on bonds, authorized by statute to be issued by a county subscribing to railroad stock, to show an actual subscription in the manner prescribed by the statute, or that a certificate of railroad stock

issued. It is enough if the bond have been delivered in payment of a subscription authorized, and when the bond recites that it issued in such payment, the presumption is that it did so, and that the county got, or can get, a certificate. A county cannot plead negligence of its own agents, in the management of its own business to avoid payment of its obligations.

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THIS was an action of debt for interest due on certain "coupon bonds," issued by the commissioners of Washington county, Pennsylvania

The declaration set forth, that the defendants "made certain coupon warrants, or promises to pay, in writing," in the form following :

"Washington County Bonds—Warrants for thirty dollars interest on bond No. 108, payable in the city of New York, on the 15th of May, 1857. For the commissioners,

A. SILVY, Clerk."

Sixty of these coupons, for \$30 each, payable at different dates, were asserted to be due and owing to the plaintiff as lawful holder.

The defendants pleaded they did not assume, and were not so indebted.

To support the issue, the plaintiff has given in evidence—

1. An act of Assembly passed on the 12th of April, 1851, which, in sections 7, 8, 9 and 10, authorized the citizens of Washington, at the next, or some subsequent general election, to decide by ballot whether or not the commissioners of said county should subscribe, in its behalf, 4,000 shares in the capital stock of the Hempfield Railroad Company, the returns of this election to be certified to the Court of Quarter Sessions, and if the judges thereof ascertained that there was a majority in favor of such subscriptions, they should make an order on the commissioners to make the subscription.

The commissioners were authorized to borrow

money to pay the subscription, and to execute bonds or promissory notes in the name of the county, transferable on the books of the commissioners, these bonds to bear an interest of six per cent., payable semi-annually, and to be received as cash by the Hempfield Railroad Company, in payment of instalments. No bond or note was to be for a less sum than \$100.

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The plaintiff gave in evidence, also, a certificate from the Court of Quarter Sessions, showing that such election was held, and that the citizens of Washington had decided, by a large majority of votes, in favor of making such subscription.

The will of the people of Washington county being thus ascertained, another act of Assembly was passed on the 12th of February, 1852, authorizing the commissioners to subscribe 4,000 shares to the capital stock of the company; to borrow money in behalf of the county, and to make provision for the payment of the principal and interest of the money so borrowed, as in other cases of loans to corporations.

The commissioners were authorized also to issue certificates of loan or bonds in the name of the county, bearing an interest of six per cent., payable semi-annually, and transferable as might be directed by the commissioners.

The railroad company were to receive these bonds as cash in payment of the stock subscribed; "and the said company are also to pay or provide for the payment of the interest accruing upon said certificates of loan or bonds, until the said railroad shall be completed." The railroad company was moreover authorized to guarantee the payment of the principal and interest of the bonds.

In pursuance of this authority the commissioners

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executed and delivered to the railroad company 200 bonds of \$1000 each, and fifty of \$500 each, payable to bearer, with guarantee of the railroad company, with interest coupons annexed, in the form above given. The bonds stipulated for the payment of the interest semi-annually on presentation of the coupons.

The plaintiff produced the bonds to which the coupons were attached with the exception of seventeen. Their execution was proved and admitted, and that they were delivered to the railroad company in payment for stock and to be used by them to raise money for the construction of the road. There was no allegation, or proof of any fraud practiced by the parties in the transaction.

The liability of Washington county on the coupons, was elaborately argued by counsel, and numerous requests for particular instructions asked in behalf of the county. The general character of the argument against its liability, as well as the particular instructions thus asked, appear in the charge of the court, which was thus given by

THE CHARGE;
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GRIER, J. These bonds, to give them more value in the market, are made payable to the holder, and thus by contract made negotiable by delivery. If the commissioners had power to bind the county for the payment of the principal and interest of a bond, transferable by delivery, the coupons which are appended to them, are the appointed evidence, by the agreement of the parties to show who is entitled as holder of the bond to receive the interest due at a particular date. They are attached to the bonds for the convenience of the officers of the county, and to facilitate their negotiation, and thereby add to their commercial value. The obli-

gation to pay the interest is to be found in the bond, not in the coupon. They are not in words an instrument in writing of a commercial nature, and having their negotiability by virtue of the law merchant. In terms these warrants are not made payable to any particular person or his order, or even to bearer. They partake of the nature of the peculiar instrument to which they are attached. They are intended by the parties to be evidence of debt in the hands of the holder, and proof of payment when in possession of the debtor. They pass by delivery, and by the contract of the parties and the usage of the country are sufficient evidence of a debt to the holder as against the obligors in the bond. They are of modern invention, and should have the effect intended by the parties and be governed by the usage of the country, and not by sharp rules of law applicable to instruments of a different nature. The possession of them is therefore *prima facie* evidence, that the holder of them is holder of the bond (or was so at least, when they were cut off), and as such entitled to receive the interest.*

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The plaintiff has shown a *prima facie* title to recover, which will entitle him to your verdict, unless the defendant has established some sufficient defence, which we will now consider.

* Ohio v.
Commission-
ers of Clinton
County, 6
Ohio State,
280.

It is contended :

1st. "That the county of Washington being merely a subordinate political division of the State of Pennsylvania, is not a citizen of this State, within the meaning of the Constitution or the act of Congress, and therefore not suable in this court."

To this we answer, that though the metaphysical entity called a corporation, may not be physically a citizen, yet the law is well settled, that it may sue and

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be sued in the courts of the United States, because it is but the name under which a number of persons, corporators and citizens may sue and be sued. In deciding the question of jurisdiction, the court look behind the name to find who are the parties really in interest. In this case, the parties to be affected by the judgment, are the people of Washington county. That the defendant is a municipal corporation and not a private one, furnishes a stronger reason why a citizen of another State should have his remedy in this court, and not in a county where the parties against whom the remedy is sought, would compose the court and jury to decide their own case. This point is therefore overruled.

2d. It is objected, moreover, to the jurisdiction of the court—

“ That the present plaintiff being in the position of a mere assignee of the chose in action sued upon, and the same being a case wherein a suit could not have been prosecuted in this court to recover on the contract if no assignment had been made thereof, this court has, under the act of Congress, no cognizance of a suit for the recovery thereof.”

This would be a valid objection if the plaintiff claimed as endorsee of a citizen of the State of Pennsylvania. But he does not claim title through any such assignment, but as holder of the bond to whom the defendants have directly covenanted to pay the bond and interest. The indebtedness declared on, results from the peculiar nature of the security. The defendants have agreed to pay the interest to the holder of the bond, as well as the principal, and having not done so, they are directly indebted to such holder for refusing to pay according to contract.

The next defence is presented in the three following points :

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3d. " That the county of Washington being a public corporation, erected for purposes of local government alone, and standing upon no contract between the Legislature and the citizen—and the said Hempfield Railroad Company being a private corporation merely, organized for purposes of trade and commerce, and as a common carrier of merchandise and passengers beyond the limits of said county, the commissioners thereof were not, therefore, authorized to embark either the credit or property of the people of said county in the hazards of such an enterprise without their unanimous consent.

4th. That if the same was done under the authority of an act of the Legislature, and without such consent, the county commissioners were, *pro hac vice* the agents of the Legislature only, and the contract so made was not the contract of the people of the said county.

5th. That as an exercise of mere power on the part of the Legislature, in thus practically compelling the people of one county to build railroads in another, and taking the freehold of the citizen without his consent for such a purpose, by authorizing a heavy incumbrance thereupon, the said act of Assembly was not a legitimate exercise of the taxing or of any legislative power, inconsistent with the principles of natural justice, with the rights of property, and the fundamental law of every free government, and at war with the great principles enunciated in our Declaration of Rights, and equally at war with the spirit and letter of the Constitution of the United States."

These three points may be said to contain a con-

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densed argument against the constitutional power of the Legislature to authorize the commissioners to bind the people of the county to pay debts incurred in these disastrous speculations.

This is the great question in the case, and if it were a new one which this court were compelled to decide without the light of precedents, we should feel oppressed with its magnitude and importance. But, happily, we are relieved from this responsibility. The Supreme Court of your State, the tribunal to whom alone is committed the high function of declaring the constitutional powers of the Legislature, have decided this question, and, to that decision, this court, and all the good citizens of the commonwealth, are bound to submit, as the declared law of the land. Although, in the course of this trial, I may have expressed opinions which I *possibly* might have entertained, had I been compelled to meet this as a new question; as a member of this court, I must instruct you that the law in question is constitutional, and that the commissioners of the county had power and authority to bind the county in conformity with the provisions of the acts already referred to; and if the bonds have been so issued and put in circulation, the county is bound by law, as well as by every principle of moral rectitude, to pay them to the *bonâ fide* and honest holders. Without further enlarging on this subject, let me refer all who feel desirous to have correct opinions on this subject, in a moral point of view, to an opinion lately delivered by the learned and able chief justice of your State, in *Thomas v. Commissioners of Allegheny*.*

* Lowry,
C. J.; 8
Casty, 218.

Additional points made are these:

6th. "That if the instruments sued on here, or the bonds with which they are connected, were in-

tended for circulation from hand to hand as a market-
able commodity, they are bills of credit within the
meaning of the prohibition contained in the first
clause of the tenth section of the first article of
the Constitution of the United States.

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7th. "That the act of Assembly of February 14th, 1852, authorizing the subscription by the commissioners of Washington county, to the capital stock of the Hempfield Railroad Company, if the same amounted in effect to a lien upon the freehold of the citizen who holds under a patent from the commonwealth, it is a law impairing the obligation of the contract between the State and the citizen, and is therefore in conflict with the first clause of the tenth section of the first article of the Constitution of the United States.

8th. "That the said recited acts of Assembly, in assuming the power to take the property of the citizen, without his consent, for a merely private purpose, is equally a violation of the fundamental principles of Republican government, and is therefore in conflict with the fourth section of the fourth article of the Constitution of the United States."

1. In answer to the first of these propositions, I instruct you that the Constitution of the United States does not forbid States or corporations from borrowing money and giving proper securities therefor, and that such securities are not bills of credit, within the meaning of the Constitution.

2. Nor does a law authorizing a county to borrow money to make a railroad on the credit of the county, and to be paid by the imposition of a tax on the citizens thereof, infringe that article of the Constitution of the United States which forbids a State to make any "law impairing the obligation of contracts."

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3. Nor is the act of Assembly in question in violation of "the fundamental principles of Republican government, and therefore not in conflict with any article of the Constitution of the United States."

9th. The ninth proposition of the defendants is:

"That if the act, under the authority of which this subscription is asserted to have been made, originated in the Senate, then, upon the principles on which such legislation has been sustained in this State, the act itself, as a money or revenue bill, would be unconstitutional under the twenty-first section of the first article of the constitution of this State."

To this I answer, that there is no evidence that said act originated in the Senate; and if it did, it is not unconstitutional for that reason. It is not a bill to "raise revenue" for the State.

10th. The tenth instruction prayed for, is as follows:

"That the instruments declared on, import no contract, in their terms, with the holder thereof by the defendant in this suit to pay the moneys referred to therein, and are not so executed as to charge the defendants under the laws of this State."

The coupons *per se*, "do not import a contract in their terms with the holder," but taken in connection with the bond to which they were attached, they do; and from the established usage and contract of the parties, they constitute the proper evidence of indebtedness to charge the defendants.

11th. Another instruction asked is this:

"That if the papers in question were originally a part of a bond, or bonds, containing a stipulation for the payment of the interest referred to therein to the holder of the said bond, the remedy, if any,

would be upon the bond itself, and the plaintiff must have set out and shown his ownership, and alleged an agreement on the part of the defendants to pay the same, in order to entitle him to recover.”

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This proposition is answered in the negative for reasons already stated. By the contract of the parties, these coupons are made evidence that the amount of interest stated is due from the county to the holder thereof.

12th. The twelfth instruction asked is:

“That the bonds issued by the defendants in payment of their supposed subscription to the capital stock of the Hempfield Railroad, are to be construed in accordance with the terms of the act of Assembly under which the same were issued, and that, under the said act, the defendants would not be liable for the payment of interest until the completion of said road.”

To this we say: The commissioners had their authority from the act, and that act authorizes them to borrow money to pay for the stock to make provision for the payment of principal and interest, and to issue bonds in the name of said county, bearing an interest of six per cent., payable semi-annually. The provision that the railroad company should bind themselves to guarantee the principal and interest, and should pay it till the road is completed, does not annul the obligation of the bond; as between the county and the corporation, the county had a right to call on them to pay the interest. But as between it and the bondholders, the contract of the county is to pay both principal and interest. The guaranty of the railroad company adds to the security, but cannot detract from it. The commissioners have not misconstrued the

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act, or abused their powers in binding the county for the payment of the interest, but pursued its true meaning and intent.

13th. The thirteenth proposition of the defendants is:

“That if the said bonds were issued upon an agreement by the company from which they have been purchased, that the defendants should not be called upon to pay the interest thereon, but that the same was to be paid by the company itself until the road was completed, it was an agreement, in effect, that the bonds should bear no interest so far as the defendants are concerned; and the same not being negotiable securities within the law merchant, are subject to all the equities which existed between the original parties, and the holder was bound to inquire before purchasing, and is affected with notice of the said agreement.”

The written instruments show the contract of the parties—the parol testimony admitted cannot affect it. What answer would it be, to an action on a note or bond, for the defendant to plead, that when he signed it his co-obligor agreed to lift it, and that he should never be troubled about it?

We proceed to the consideration of the fourteenth and the several subsequent propositions:

14th. “That to entitle the plaintiff to recover in this case, he must first have shown an actual subscription in the manner prescribed by the act incorporating the said company, or at least an actual subscription of some sort by the commissioners; and that in the absence of any subscription, or of the issue and delivery of any certificate of stock by the said company, the issue of the bonds was without authority of law, and the defendants are not liable in this suit.”

This proposition cannot be admitted. The bond recites that it was for subscription to the stock. The witness has proved that they were delivered in such payment. Whether there was literally a subscription, or written *promise to pay*, is of little importance, if it was paid; also whether the county has got a certificate of stock, was a matter with which the holder of the bond had no concern, and is not bound to prove. If the county has no certificate, it can obtain it by suit, if refused. It cannot now plead the negligence of its own agents in the management of its business, to avoid payment of its obligations. For anything that appears, they have it, or can get it, and in absence of proof, the presumption is that they have it.

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15th. "That if no subscription was actually made by the commissioners in the manner indicated by the law, no subsequent vote of theirs by proxy, supposing the same to have been duly proved, could cure the infirmity, or operate as an estoppel against the defendants."

This has been sufficiently answered in our remarks on the fourteenth proposition. If the bonds were delivered in payment for the stock, there is no infirmity to be cured.

16th. "That taking the papers sued on to be warrants, or certificates of loan, under the act of Assembly, it was essential to their validity, as such, that they should be signed by the commissioners themselves, or a majority of them, and attested in the former case by their clerk, and authenticated in the latter by the seal of the county."

To this we answer, that the obligation of the defendant to pay both principal and interest, is to be found in the bonds (as already explained), which are

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properly executed by the commissioners, and bind the defendants to pay the interest as well as the principal.

17th. "That there is nothing in the act authorizing the said subscriptions to warrant the issue of any other securities than the bonds or certificates of the county therefor, in sums not less than one hundred dollars each, but that, on the contrary, assuming the instruments sued on to be promises or certificates of debt or loan, and to have been otherwise well executed, they are in direct violation of the provision which forbids the issue of any certificates for a less amount than one hundred dollars, and are, therefore, not obligatory on the defendants."

The answer to this proposition is, that the commissioners have issued no other securities than the bonds, and, as already stated, the coupons are made for the convenience of the officers, and as evidence that the holder is the person entitled to receive the interest due on the bond described therein.

This ends the catechism, and, as a result of the whole, the court instruct you, that if you believe the testimony submitted to you by the plaintiff, he is entitled to your verdict, notwithstanding any testimony produced by defendant, and the many legal objections so ingeniously and ably argued.

The jury found a verdict for the full amount of the plaintiff's claim, \$1910.70.

[AT PITTSBURG.]

APPENDIX.

[This case as decided in the District Court, by Judge Hopkinson, is reported at large in Gilpin, 10. The present opinion, however, reversing the decree below, has never as yet been reported in the Circuit Court reports. Its value, perhaps, will justify its insertion in the present form.]

THE SENECA.

Where two equal joint owners of a ship, differing as to which of the two was entitled to appoint the master, there being no difference between them, as to the destination of the vessel, and one of them insisting to undertake a voyage in person, as master, in opposition to the will and equal rights of the other part owner, the other applied by petition, asking either for the sale of the joint property, or that he might be permitted to send the vessel to sea under a master of his own appointment; *held*, that a sale of the vessel ought to be decreed.

The jurisdiction of the District Court, under the 9th section of the judiciary act of 1789, embraces all cases of a *maritime* nature, whether they be particularly of admiralty cognizance or not; and such jurisdiction, and the law regulating its exercise, are to be sought for in the general maritime laws of nations, and are not confined to that of England, or any other particular maritime nation.

The provisions of the French marine law which authorize a compulsory sale of a vessel, in case of partners disagreeing about the use of her, are part of the general law of admiralty binding on the courts of the country.

THIS case came before this court by appeal from the District Court, in which a petition was filed on the 4th of December, 1828, by Davis & Brooks, merchants of the city of New York, stating that they were owners of one-half of the brig Seneca, then lying in the port of Philadelphia, and that the remaining half part belonged to Captain Henry Levely; that Captain Levely had had possession of the brig for several months, having the sole control thereof, and had proceeded on certain voyages to

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the detriment and dissatisfaction of the late part owners (from whom the brig was purchased by the petitioners), and then again threatened to take the vessel to sea without the consent of the petitioners, and to their great detriment; the petitioners further stated that finding themselves in a very inconvenient situation by the conduct of Captain Lively, they had repeatedly offered to sell their share to him at a reasonable price, or to purchase his share on sufficient terms, or to sell the entire vessel at a public sale, or to send her to sea with a master appointed by themselves; but that the said Captain Lively had obstinately refused to adopt either of these courses, and persisted in declaring that he would take the vessel to sea.

In consideration of these circumstances, the petitioners prayed an attachment against the vessel, and a citation to Captain Lively to show cause, why the court should not grant an order for the sale of the said vessel; or why the petitioners should not be permitted to send her to sea with a master appointed by themselves. The attachment and citation were granted—and after argument, the judge of the District Court (Judge Hopkinson) delivered an elaborate opinion against the authority of the court to order a sale of the vessel, and decreed that neither of the prayers of the petitioners could be granted and that the petition be dismissed.

From this decree the petitioners appealed. After the cause came into this court, the appellants obtained leave to amend their petition, which amended petition, after repeating the various offers made by them to the respondent, as set forth in the original petition, and with more precision as to the last of them, stated their offer that the brig should be sent to sea on a designated voyage, under the charge of a master to be agreed upon by both parties, all of which offers they stated were refused. That the respondent had obtained and now retains possession of the brig, in an illegal manner, and against the will of the petitioners,—that he had recently appointed a master to

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command her, without the assent of the petitioners, and now threatens to send her on a voyage under the person so appointed by himself, without their concurrence and against their consent, whereby they would be deprived of their moiety of the profits of the vessel. The prayer was, that the respondent might be restrained from taking or sending the brig to sea, and that a sale of the brig be decreed, or that the petitioners might be permitted to send the vessel to sea on a voyage proposed by them.

The amended answer denied that the offers stated in the amended petition were made;—it stated that the respondent proposed to the petitioners that she should be fitted out and employed, but that they refused to expend a dollar upon her, and would rather see her rot at the wharves than have anything to do with her;—that the respondent then determined to fit her for sea; and after he had fully repaired her, at a great expense, and was ready to proceed to sea, he was stopped by the process issued from the District Court;—he affirmed that it never was his intention to send her to sea under the command of the person mentioned in the petition, his determination being to command her himself on the projected voyage.

The new evidence taken in this court tended to prove the following facts:

1. That the petitioners objected to incurring any expense for the repairs or outfit of the vessel for a voyage *to be conducted by the respondent as her master.*

2. That they expressed their willingness to take possession of the brig, and to employ her under a skilful master, and to give bonds to account for her earnings; or to sell their moiety of her to the respondent for 1500 dollars, as she stood, before she was repaired.

3. That they offered to the agent of the respondent, that the brig should go to sea under another master than the respondent, and that they sent on a person to take command of her; but possession of her was refused. That a specific voyage to Wilmington, in North Carolina, was

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STATEMENT. proposed by Henshaw, under whom the petitioners claimed, and who acted as the representative of the petitioners claiming a lien on the vessel.

ARGUMENT. After argument in this court, by Messrs. Wharton and Sergeant for the appellants, and Messrs. Binney and Chauncey for the appellee, the opinion of the court was pronounced by

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OPINION. WASHINGTON, J. The novelty, as well as the difficulty of this case, well entitle it to the labor, the talents, and the learning which have been bestowed upon it at the bar. It is not my intention to follow the counsel over the whole ground which they have so ably occupied, much less to express an opinion upon many of the topics which they have discussed. In the unsettled state of admiralty jurisdiction and admiralty law in the United States, I think it is the safest course to advance step by step in deciding the many new, and often intricate questions to which those subjects may give rise. Influenced by this consideration, I shall confine my observations to the precise case before me; which, from the *amended pleadings* and the *new evidence* exhibited in this court, I find to be that of joint owners of a vessel, having *equal interests* in her, *each willing* and desirous to employ her in navigation, but upon his own terms, and neither willing to do so upon any other. The terms upon which the appellants desire it are, that she may be commanded by a master of their appointment, and, at all events that Levely should not be that master. The appellee objects altogether to those terms, and claims to take her to sea under his sole command. It is manifest, therefore, that the difference between these owners, is not, whether the vessel shall be employed, but which of them shall be entitled to appoint the master; and, that upon this point, all prospect of compromise is hopeless. They do not differ, it is true, as to the destination of the vessel, because, until this preliminary matter of disagreement was adjusted, it was unnecessary for either to pro-

pose or to discuss the expediency of any particular voyage. But I consider it to be entirely unimportant to the decision of this case, whether the subject of difference be the appointment of the master, or the particular destination of the vessel, if the consequence in either case, as to the employment of the vessel must be the same.

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In this state of things, the respondent, assuming to act as master, and insisting to undertake a voyage in opposition to the will, and to the equal rights of the other part owners, the latter applied by petition to the District Court to decree a sale of the joint property, or that they might be permitted to send the vessel to sea under a master of their own appointment. The important question presented by this petition was, had that court *jurisdiction* and *authority* to decree a sale, and a division of the proceeds?

As preliminary to the investigation of this question, I not only admit, but insist,

First, that the judicial power of the United States under the Constitution—and the jurisdiction of the District Courts, under the 9th section of the judiciary act of 1789—embrace all cases of *maritime nature*, whether they be particularly of admiralty cognizance or not.

Second, that this jurisdiction, and the law regulating its exercise, are to be sought for in *the general maritime law of nations*, and are not confined to that of England, or any other particular maritime nation.

Lastly, that the present is a case of admiralty and maritime cognizance, since it involves a dispute between part owners of a vessel, concerning the disposition and employment of her in navigating the sea.

But these positions, if they be correctly taken and admitted, overcome only a part of the difficulties which this case presents. We are still left to inquire, does this maritime law authorize a sale of the property in a case like the present? And where is that law to be found? For I cannot agree with the appellant's counsel, that if the *jurisdiction* of the court be established, the *authority*

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1861.

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follows as a corollary. The Circuit Courts of the United States have a common law jurisdiction in all the cases to which it is extended by the Constitution and acts of Congress; but the rules by which they are authorized to decide on any given case, must be sought for in the law of the land.

Where then is the law applicable to this case to be found? Not in the practice, or adjudications, of the Admiralty Court of England. The case of *Ouston v. Hebdon** and that of *The Apollo*† are conclusive both against the jurisdiction and the authority of that court.

* 1 Wilson,
101.

† Haggard,
306.

We next pass to those great sources of maritime jurisprudence, the Rhodian law, and the laws of Oleron and Wisbuy, in neither of which do we find any provision made for a case similar to the present.

Our attention is then invited to the civil law, or rather to the Roman marine code, another legitimate source of general maritime law; in which we find sundry wise provisions for adjusting disputes between part owners of vessels, from which the three following rules may be deduced.

1. That the opinion and decision of the majority in interest of the owners, concerning the employment of the vessel, is to govern, and therefore they may, on any probable design, freight out or send the ship to sea, though against the will of the minority.

2. But if the majority *refuse* to employ the vessel, though they cannot be compelled to it by the minority, neither can their refusal keep the vessel idle, to the injury of the minority or to the public detriment; and since in such a case the minority can neither employ her themselves nor force the majority to do so, the vessel may be valued and sold.

3. If the interest of the owners be *equal*, and they differ about the employment of the vessel, one half being in favor of employing her, and the other opposed to it, in that case the willing owner may send her out.

It is manifest that neither of these rules applies to the present case, in which there are no *unequal interests* and no *unwilling owner*, each being desirous, and equally so, to employ the vessel.

APPEALS, 1830.

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In the further prosecution of our inquiries, we are naturally led to an examination of the marine code of France,—to those celebrated ordinances of Louis XIV., published to the maritime nations of Europe as early as the year 1681. The 5th and 6th articles of this code, cited, and learnedly commented upon by Valin, p. 564, will alone be noticed. The former is substantially the same as the first rule of the Roman law before referred to. The latter is as follows:

“No person may constrain his partner to proceed to the public sale of a ship held in common, except the opinions of the owners be equally divided about the undertaking of some voyage.”

There is certainly some ambiguity in the phraseology of this article, and, unexplained, it might be construed to mean no more than is expressed in the third rule of the Roman law before noticed, applying to owners having equal interests. But Valin leaves no room for doubt as to the true exposition of the article. In his first volume, page 585, he says: “The case excepted in this article is, when ‘the opinions of the parties are equally divided on the undertaking of some voyage,’ upon which we may remark, that the question is not of two equal opinions, of which one is to leave the vessel without any kind of voyage, and the other to undertake such and such kind of voyage, there being no doubt in that case that the opinion favorable to a voyage ought to prevail, saving the right to discuss the projected voyage; but solely, of the case of two opinions equally divided upon the particular enterprise projected by one moiety of the persons interested, and rejected by the other moiety, whether that moiety proposes on its part another voyage, or confines itself to a disapproval of it, *provided, nevertheless, that it gives plausible reasons for its conduct*; otherwise this would have the air

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of an absolute refusal to permit the vessel to be navigated which justice could not tolerate, being contrary to the object of the vessel, to the original intention of the parties, and to the interests of commerce."

This article, thus explained, embraces the present case, unless it could be successfully contended that there is a substantial difference between a disagreement respecting the particular voyage proposed and discussed, and the appointment of the master to conduct the voyage. The reason strikes me to be the same in the one case as in the other, and the consequence to the parties, to their original intention, to the object of the vessel, and to the interests of commerce, are precisely the same. In the one case as in the other, the vessel must remain unemployed, since neither owner can, otherwise than tortiously send her to sea, against the will of the other. And were he to persist in doing so, is there no power in a court possessed of general maritime jurisdiction, to restrain him? I am not prepared to admit so monstrous a legal solecism as the denial of this authority would seem to imply.

But the ordinance provides that the party objecting to the voyage must assign a plausible reason for his conduct, in order to repel a presumption that his objection is founded on an unwillingness to employ the vessel at all. And is it not more than a *plausible* reason for one owner to allege his equal right to employ the person to whose care his property is to be entrusted, and to object to the one selected by the other owner, upon the ground of his want of confidence in the skill or in the integrity of the person so selected? I am far from saying, or even believing, that, in point of fact, the objection to Captain Lively is well founded, since there is no proof in the cause to substantiate it; but if it be honestly entertained by the appellants, it is not for this court to decide that it is futile, and merely urged as a pretext for detaining the vessel in port.

Having ascertained the true meaning of this article of the French marine ordinances, its authority, or the in-

fluence which it should have in deciding this cause, is next to be considered.

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It is insisted by the counsel for the appellee, that this article is nothing more than a part of the local law of France, founded upon the Roman law of licitation, adopted by France, applicable to the partition of property, movable and immovable, which is held in common by two or more persons, which, without a sale, could not be otherwise conveniently divided between them; and, in support of this argument, it is remarked that the expressions of the article are all negative, and must necessarily refer to some other code whenever the excepted case shall occur.

The ingenuity and the imposing appearance of this argument are freely acknowledged; but it will not, I think, bear a close examination. For, admitting the general law of licitation to have formed a part of the *local* law of France, it does not follow that an ordinance restraining and qualifying that law in cases, and in relation to subjects purely maritime in their nature, should likewise form a part of the local law of that country. It would rather seem that, on account of their maritime character, it was deemed proper to withdraw such subjects from the local, for the purpose of incorporating them into the general marine code of the nation. That the 5th article is of this description, has not been questioned; it was no doubt copied from the Roman maritime code, which having also provided for cases of disputes between the owners of unequal interests, as well as between those having equal interests in *one event only*, it would seem as if the 6th article had been introduced for the purpose of perfecting the system, by affording a remedy, in *another event* for which the Roman law had made no provision. It is most obvious, in short, that Valin, as well as other jurists who have treated of these articles have considered them, not as part of the common, but of the maritime law of France, and we find provisions similar to them in

AP'L SESSIONS, 1820. principle introduced into the Code de Commerce of that country.

THE COURT'S
OPINION.

That the ordinances of Louis XIV. are not of binding authority upon the maritime courts of other countries I freely admit; but as affording evidence of the general maritime law of nations, they have been respected by the maritime courts of all nations, and adopted by most, if not by all of them, on the continent of Europe. We are informed that this code was compiled from the prevailing maritime regulations of France, *and of other nations*, as well as from the experience of the most respectable commercial men of France. And why should not such parts of it as are purely of a general maritime character, which are adapted to the commercial state of this country, and are not inconsistent with the municipal regulations by which our courts are governed, be followed by the courts of the United States in questions of a maritime nature? I leave this question to be answered by those who would restrain the admiralty jurisdiction of the District Court within the limits allowed by the common law courts of England to be exercised by the High Court of Admiralty of that country.

And why, let me again ask, shall the 6th article of this code be rejected in the case now under consideration? Neither justice nor policy requires it. For it is manifest that the appellants must either surrender their property in this vessel, or rather the fruits of it, to the appellee, or their equal right to appoint the master, and to decide upon her destination, or that she must remain idle in port until the subject in dispute is totally lost to both the owners. There is no other imaginable alternative, unless it be the one which the appellants ask for. For if the appellee may now legally claim the right to take this vessel to sea, and, by giving security for her safe return, may take to himself, in exclusion of the other part owners, all the earnings of the voyage, his right to employ her, on the same terms, as long as she shall be in a condition to be

navigated, will continue equally valid, and the exercise of it can no more be denied then than now.

APPEALS, 1829.

Suppose, for the purpose of further illustrating this part of the subject, these parties had filed cross petitions, setting forth the difference between them respecting the appointment of a master, and each praying to be permitted to take the vessel to sea under the usual stipulations, since neither could entitle himself to a preference, what could the court do but dismiss both petitions, and thus leave the vessel unemployed; unprofitable to both parties and to the interests of commerce, and subject to all the injury to which such a state of things would expose her. Yet this is substantially the present case; and if the court has no power to decree a sale, it is clear that neither of the parties can take the vessel to sea without a decree of the District Court authorizing him to do so.

THE COURT'S
OPINION.

Upon the whole, considering the article of the French code, which has so often been referred to, as constituting a part of the maritime laws of nations—that it is in itself a wise and equitable provision—that it is not inconsistent with the commercial state of this country, or with any law which should govern this court, I feel myself not only at liberty, but bound to adopt and apply it to the present case, and I shall therefore reverse the sentence of the District Court, and decree a sale of this vessel.

My opinion, I acknowledge, was very different when this cause was opened, from that which I now entertain. I had read that which was pronounced in the District Court by the learned judge of that court, with an entire conviction of its correctness. But the new evidence which has been introduced in this court, presents, in at least one most essential particular, a different case from that which was submitted to the view of that court.

INDEX.

ACCOUNT. See EQUITY, 1; PRACTICE, 14, 15.

Equity for one, in patent and copyright cases is not, in the courts of the United States, a mere incident to a right to injunction, but may exist when there can be no injunction, as *ex. gr.*, where the term of the patent has expired before the final hearing of the case. *Blank v. The Manufacturing Company*, 196

ACTION.

If parties, in making a contract under which disputes are contemplated as possible, agree under seal to submit any such disputes to private arbitration, as *e. g.*, to the award of some third person, so that his decision shall be final and conclusive on them both, it is a bar to any action on the contract that the plaintiff does not either aver and prove such award, or aver and prove such facts as excuse it. *Fox v. The Railroad Company*, 243

ACTS OF LIMITATION. See LIMITATION, ACTS OF.

ADMIRALTY.

See CANAL BOATS; COLLISION; PART OWNERS OF SHIPS; PRACTICE, 4, 5.

1. The jurisdiction of the District Court, under the 9th section of the judiciary act of 1789, embraces all cases of a *maritime* nature, whether they be particularly of admiralty cognizance or not; and such jurisdiction, and the law regulating its exercise, are to be sought for in the general maritime laws of nations, and are not confined to that of England, or any other particular maritime nation. *The Seneca*, 395
2. The provisions of the French marine law which authorize a compulsory sale of a vessel, in case of partners disagreeing about the use of her, are part of the general law of admiralty binding on the courts of the country. *Id.*
3. Although the extension of admiralty jurisdiction over our fresh water public rivers seems to have been assumed rather from the decision of the Supreme Court in *The Propeller Genesee Chief v. Fitzhugh*, decided in 1851, than from the act of Congress of February 26th, 1845. which speaks only "of the lakes and navigable waters connecting said lakes," yet it does not follow that the admiralty may assume jurisdiction over everything floating on such rivers. On the contrary, the jurisdiction now assumed over such waters, should be restrained to subjects which that act defines, to wit, "to vessels over twenty tons burden, licensed and enrolled for the coasting trade," and in order to give jurisdiction, the pleadings in cases where the matter complained of has occurred on waters not connecting the lakes, should contain such averments as will show that the case comes otherwise within the facts and conditions of the above mentioned act. *Jones v. The Coal Barges*, 53
4. The coal barges, arcs, or flat boats used on many rivers, to transport merchandise down stream, not being over twenty tons burden, nor licensed and enrolled for the coasting trade, and usually broken up and sold for lumber at the end of their voyage, are not "ships or vessels," subject to admiralty jurisdiction on such waters. *Id.*

ADMISSION IN AN ANSWER TO BILL. See PRACTICE, 16.

ADVERSE POSSESSION. See LIMITATION, ACTS OF.

1. A refusal by one tenant in common to let his co-tenant come in or participate in the enjoyment of the common property, constitutes an adverse possession. *Den ex dem. Roberts v. Moore*, 292
2. The possession of lands by an agent or manager, is an *actual* possession, within the meaning of "the *thirty years act*" of New Jersey; and constitutes an adverse possession as against a co-tenant. *Ib.*

AGENCY.

Though by the charter of an insurance company it is provided that "every contract, bargain, and other agreement," in execution of the powers of the company, "shall be in writing or print, under the corporate seal, and signed by the president, or, in his absence or inability to serve, by the vice president or other officer, &c., and duly attested by the secretary or other officer," &c., a parol agreement as to the terms on which a policy shall be issued, made by the president, secretary, or other general agent of the company may, nevertheless, be enforced specifically in a court of equity, yet a mere collateral agreement, which does not involve the execution of a policy of insurance, is not within the scope of the general authority of an officer or agent of such a corporation, and cannot be enforced. *Constant v. The Insurance Company*, 318

ALIEN. See PATENT, 1, 2, 3; ALLEGIANCE.

ALLEGIANCE. See CITIZENSHIP.

A mere "declaration of intention" by an alien, under the naturalization laws of the United States, to become a citizen, &c., and to renounce all allegiance to a foreign, (his natural) sovereign, is not sufficient, of itself, in a judicial point of view, and without being perfected by an actual renunciation to prevent such alien from being regarded as a "foreign citizen or subject," within the meaning of that clause of the Constitution which gives jurisdiction to the courts of the United States over controversies between the citizens of a state and "foreign citizens or subjects." *Baird v. Byrne*, 1

ANSWER IN EQUITY. See PRACTICE, 14, 16.

APPOINTMENT. See POWERS.

ARBITRATION. See ACTION.

AWARD. See ACTION.

BLOCKADE. See PUBLIC LAW.

CANAL BOATS.

1. The character of a boat, i. e., the question whether a boat is a canal boat or vessel of another kind, is to be determined by her build, object, and general and ordinary purposes and uses, and not upon the fact whether she is found, for part of her voyages or occasionally, in tide waters, and is moved on them by steam. If she is a canal boat in common and just parlance, she does not become a steamboat, or anything but a canal boat, by being pulled or pushed by a steam tug. *Buckley v. Brown*, 199
2. "Canal boats," as their character is settled by this rule, "without masts or steam power," are not liable to pay the "marine hospital tax" laid on registered vessels, by the act of July 16th, 1792, § 2; a subsequent act, st., of July 20th, 1846, § 1, exempting "canal boats" of this character. *Ib.*

CHILDREN.

The term *may* include grandchildren. *Ingraham v. Meade*, 32

CITIZENSHIP. See ALLEGIANCE; CUSTOM HOUSE REGISTRY.

1. Within the meaning of the act of May 15th, 1820, for suppressing the Slave Trade, considered and passed upon. *United States v. Darnaud*, 143

CITIZENSHIP—*continued*.

2. Not constituted so as to exclude the jurisdiction of the Circuit Courts, where a "foreign citizen or subject" is a party, by a mere "declaration of intention." *Baird v. Byrne*, 1

COLLISION. See PRACTICE, 5.

1. Steamers, especially large steamers, are held to the strictest care possible when in ports or in the neighborhood of sailing and smaller vessels; and must move slowly and with extreme circumspection. And if, from violation of this duty, small or sailing vessels are put suddenly into confusion and jeopardy, the court will not inquire whether the rules applicable to ordinary cases of meeting, have been strictly observed by the weaker vessel, or not; but will hold the steamer responsible, as reckless, for all injury happening to or committed through the act of the weaker vessel, from mistake caused by the embarrassment natural to the condition into which the steamer has put this weaker vessel. *The Steam Tug Sampson*, 14
2. Though the rule of porting the helm is obligatory, when, in ordinary cases, vessels meet in the same line, it is not one always to be observed when they are in *parallel* lines. Circumstances control the rule; and, when a boat is moving against the tide, slowly and with difficulty (as when tugging a heavy vessel), and is out of the centre of the channel, which is left free to the other, the rule can have no application. *Ib.*
3. Where a boat in charge of a tug, whose owners have contracted to tow her, is lost by a collision between the tug and a steamer—the boat towed being clearly in no fault—the court will not, on a libel against the tug, be astute to inquire whether as between the tug and the steamer, the one or the other of these last was to blame for the collision. In a case of doubt—and especially if by an error of the court below, not remediable here, it has lost its remedy against the steamer—it will rather give the boat towed, reparation against the tug which has contracted to carry it, leaving this last to recover the whole or a quantum of damages from the steamer. *The Enterprise v. The Napoleon*, 58

COMITY, JUDICIAL.

1. The disposition of the Federal courts on questions relating to *real estate*, to follow the law of the States as settled by their courts of final jurisdiction, is so strong, that it will not enter into any consideration of the conflicts that have existed from time to time, or all the time, between the court under different organizations or different sets of judges; nor go into any comparison of the respect which is due to a majority of the court, who by a bare majority carried a decision in one way, with the respect due to a very able minority who have constantly and strongly dissented. If the decisions are not *in equilibrio*, this court, on such questions, will take the law as it appears to be settled by the last decision, without entering upon the question whether on true principles it was rightly or wrongly decided. *Smith v. Shriver*, 219
2. The fact that by the laws and customs of Pennsylvania, the Orphans' Court of the county, as a special court of equity, has jurisdiction of the accounts of executors, &c., is no bar to the Federal courts exercising jurisdiction over exactly the same subjects;—other things allowing, and the Orphans' Court not having at the time actual possession of the case or parties. *Allen v. Allen's Executors*, 248

COMMISSIONER OF PATENTS. See PATENT, 1-3.

COMMON CARRIERS. See DAMAGES, 1.

Steam Tugs are not. *The Enterprise v. The Napoleon*, 58

COMMUNITIES IN THE COMMUNITY. See PARTNERSHIP PROPERTY.

The law allows no communities, however independent in their structure of general society—or however long established—or however much in the habit of regulating, as a community *in* a community, their own concerns,—to be above its constant and complete control. And even where such communities are well formed, and have been long existing with order and success, the court will neither enforce nor allow their peculiar arrangements,

COMMUNITIES IN THE COMMUNITY—*continued*.

if against common right, further than the parties have *agreed* to enforce and allow them. In case of the violation by such a community, of a party's rights, as the law and the court deem right, the court will interfere, and dealing with the community as a defendant, will override its administrations, plans and opinions; and will enforce rights and duties as it and such law deems them, irrespective and in violation of the general administration, plans or opinions of the community. *Nachtrieb v. The Harmony Settlement*, 66

CONFIDENTIAL RELATION.

The relation of a spiritual ruler with his people is so confidential, and one of such inequality, that courts watch it narrowly as liable to abuse; and considering that free will can hardly be predicated of acts done by a person at the direction of such ruler or superior, will treat as of very little intrinsic value, receipts or releases, given by a person so dependent, by such direction against his own interest. *Nachtrieb v. The Harmony Settlement*, . . 66

CONSTITUTIONAL LAW. See MUNICIPAL BOND, 5-8.

1. No State of the Federal Union, by declaring, in a grant which it makes of certain rights, that any question which arises under that grant, shall be determined in such or such a way, can prevent any class of citizens from suing in the Federal courts, if, by the Constitution and statutes of the United States, they have a right to sue in such courts. *Mason et al. v. The Boom Company*, 252
2. The constitution of New Jersey adopted in 1844, limits the powers of the Legislature and separates them from those of the judiciary, and adopts the prohibitions of the Constitution of the United States against laws impairing the obligations of contracts, and further, prohibits the depriving a party of any remedy for enforcing a contract which existed when the contract was made. Hence, where the Legislature passed an act for the relief of the creditors of a manufacturing corporation, providing that certain persons should be authorized to sell all property mortgaged for the payment of bonds, at public sale, to the highest bidder, *free from all encumbrances*, and after paying certain expenses and costs, should distribute the proceeds to the corporation's creditors, according to the priorities of their several liens, it was held that such legislation was unconstitutional, by reason of its impairing the obligation of the contract between the mortgagors and the mortgagees, and depriving the mortgagees of a remedy which existed at the time the contract was made. *Martin v. The Somervilles Company*, . . 206

CONSTRUCTION OF STATUTES. See EQUITY, 5, 8; SURETIES.

1. Although it is a settled rule of law, that when a proviso to a grant of any kind is repugnant to the grant itself, the grant is good and the proviso only void, yet this is a rule which is to be taken with modifications. And in the construction, especially of American statutory grants in derogation of common right—passed as private acts, oftentimes are in our Legislatures, inconsiderately and after having been ingeniously drawn beforehand by persons who had a special and not allowable interest of their own in view, and who have contrived language to carry their object, in such a way that the Legislature, less acquainted than they with exact facts, could not discover the precise import of the words used—the rule is always to be taken in subordination to the greater rule of law, that the true intention, as apparent from the whole grant, is to be effectuated.
2. Hence, if on a whole case, reference being largely had to the public interests, in determining this point, it appears that a grant meant to give rights in case those rights could be enjoyed in a certain way, in which way it is plain, after experiment, that they cannot be enjoyed, then the whole grant is void. And in such case it makes no difference whether the qualification to the grant be put in adjectively and after an absolute previous grant, or whether it be put in previously and as a condition precedent. *Mason v. The Boom Company*, 252

CONTRACTS, OBLIGATION OF. See CONSTITUTIONAL LAW, 2.

Illustration of a law of New Jersey in impairing the obligation of one in that State. *Martin v. The Somerville Company*, 206

COUNTIES. See MUNICIPAL BONDS.

Their liability for bonds issued by them in aid of railroads. The whole subject can be heard. *McCoy v. Washington County*, 381

COUPON BONDS AND COUPONS. See MUNICIPAL BONDS.

CUSTOM.

The practice of all the lines of steamships between Liverpool and America, for three years—the lines being two in number—to ship goods in a certain way, is not such a legal *custom* as will at all affect the terms of a contract in which any other way is specified, though such other way was always set forth in all contracts of the company, it having been the way as set forth in a printed form, and in practice constantly departed from. Nor, though conceded to be a practice well known to persons in Liverpool, would it be regarded in law as probably known elsewhere, *e. g.*, at Havre, nor, however, acted on by persons at Liverpool, be regarded as having been the implied basis of a contract, made at Havre by persons not from Liverpool, about a shipment to America, though the shipment was from Liverpool. *Bazin v. The Steamship Company*, 229

CUSTOM HOUSE REGISTRY.

Oath of a person at the custom house under the acts of Congress, that he is owner of a vessel is insufficient proof, in a criminal prosecution against a third person, (if it be evidence at all) of the fact of such ownership. *United States v. Darnaud*, 148

DAMAGES.

1. On a claim of damages for goods lost by a common carrier, the rule is that the carrier shall pay their net value at the place of delivery, with interest from the day when they should have arrived. Anticipated business profits are not allowed. *Bazin v. The Steamboat Company*, 229
2. As found by the Federal courts sitting in equity will not be trebled under the patent act of July 4th, 1836, § 14, as they may be by those courts when sitting at law, on a verdict of judgment. *Livingston & Co. v. Jones & Co.*, 330

DEED. See INTERPRETATION, RULES OF.

DELAWARE RIVER. See WHARVES.

DEVISE. See LAST WILL AND TESTAMENT.

DISABILITIES. See LACHES.

EJECTMENT. See PRACTICE, 3.

EQUITY. See CONFIDENTIAL RELATION; INTERPRETATION, RULES OF, 2; LACHES; MARSHALLING OF ASSETS; PARTNERSHIP PROPERTY; PATENTS, 4; POWERS, 2; PRACTICE, 6-18; PREVENTIVE AND REMEDIAL JUSTICE DISTINGUISHED; TRUSTS CLEAVING TO LAND.

1. Where an alleged infringement of a patented invention, consists in the use of some improvement in expensive machinery, which has been adopted in good faith by a defendant, and where the profit of the patentee consists not in the monopoly of selling his machine, but in the price of licenses given to others to use it; it being the interest of the patentee that all persons should use his improvement, provided they pay him his fee for a license; and the injury being, not in their using his invention, but in their not paying him for using it—this court, sitting in chancery—though it does not in such capacity necessarily act as auxiliary to a court of law, but may render a final decree on a patent—will not, before a right is established at law, grant a preliminary injunction except in a clear case; since it might ruin the defendant, without doing any corresponding benefit to the patentee; and since the main objects of an injunction can be obtained by making the defendant keep an account until the right is decided at law. *Batten v. Sillman*, 124

EQUITY—continued.

2. The court distinguishes such a case as that just mentioned from the case of a medicine, for example, where the patentee's profit consists in a *monopoly* of sale, and the defendant has been at little or no expense, while his competition might be highly injurious to the complainant: and would refuse an injunction in the former case, when it might, perhaps, grant it in the latter. *Batten v. Stillman*, 124
3. Equity will not interfere by injunction in questions of trade mark between the vendors of patent medicines, being quack medicines, such questions having too little merit to commend them on either side. *Heath v. Wright*, 141
4. The equity for an account in patent and copyright cases is not in courts of the United States a mere incident to a right of injunction, but may exist where there can be no injunction; as *ex. gr.* where the patent has expired before final hearing. *Blank v. The Manufacturing Company*, 196
5. Under the judiciary act of 1789 (section 30), witnesses may be examined *ors tenus* in equity suits, as well as at common law, and this right is not taken away by any subsequent act nor by the 67th rule of practice for courts of equity, promulgated March 2d, 1842, nor otherwise. *Sickles v. The Gloucester Company*, 186
6. Where stocks had been loosely settled or transferred by a husband and father to trustees for his wife and children, the instrument declaring only in general terms on its face that the property was for the wife and "her children;" the nature and extent of the wife's interest or control not being on the instrument or otherwise, in any way specified; the court sitting in equity allowed such a settlement to be controlled by a solemn deed made sometime afterwards by the trustees, the wife and the father, reciting the former loose settlement, reciting further that it was expedient now to declare the said trust, and now declaring the trust to be (among other things) that the wife on her death might dispose of the stocks among *such of her children and in such proportions* as she by her will might appoint. *Ingraham v. Meade*, 33
7. Where the meaning of a deed is not absolutely clear, and the rights of the party claiming under it are disputed, a preliminary injunction will not be granted to restrain a person acting in violation of alleged rights, unless it is plain that irreparable injury is likely to be suffered. And where the defendant is laying out his own money in such a way that the complainant, if his construction of his deed be true, can ultimately get the benefit of it all, and where the defendant has not received from his outlay any return as large as the outlay itself, the injury will not be regarded as irreparable. *French v. Brewer*, 346
8. *Seemle*, That the Pennsylvania statute of 1806, which enacts that in "all cases where a remedy is provided or duty enforced, or anything directed to be done by an act or acts of Assembly of this Commonwealth, the directions of the said act shall be *strictly* pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases further than shall be necessary for carrying such acts into effect," has reference to *legal* remedies only, and having been passed, when from want of a court of equity, the equitable remedy of injunction was unknown in Pennsylvania, does not enjoin injunction. *Mason v. The Boom Company*, 263

EQUITY PRACTICE. See PRACTICE, 6-18

ESTATE.

- A devise to A., for her maintenance and support during life, and at her decease to become the property of B., not to be subject to sale or mortgage, but to descend to his children free and unencumbered; but in case he has none living at his death, to become the property of C., in fee simple, or of her heirs, if she be not then living. *Held*, to give 1st, A life estate to A. 2d. A similar estate to B. 3d. Remainder in fees to B.'s children, vested as to those born at the testator's death, and opening to let in others as they were born. And 4th. A contingent remainder to C. in fee. *Leavitt v. Logan*, 184

EVIDENCE. See CUSTOM HOUSE REGISTRY; MUNICIPAL BONDS, 1, 11, 13; PRACTICE, 2, 16.

1. Admissions, when they are but such as may be considered the natural effusions of mortified pride or vanity, though clear and distinct against a party's interest, are entitled to but little weight as evidence against him. *Nachtrieb v. The Harmony Settlement*, 66
2. Even very strong proof of forgery derived only from knowledge of handwriting, ought not to control positive, unimpeached evidence of an actual execution. *Turner v. Hand*, 86
3. Strong evidence of the forgery of a will being given, the declarations of alleged testator, after the alleged making of the will, as to the mode in which he had disposed of his property, are evidence, such declarations being offered as a fact or circumstance tending to prove fraud and forgery, by showing that the alleged testator had no knowledge of the existence of such an instrument. But such evidence is not generally admissible; is dangerous in its effect on a jury, and ought to be controlled by the charge and powers of the court. *Ib.*
4. The deposition of a witness, deceased, taken in the Prerogative Court on a caveat against a will, may be read in an ejectment, where the plaintiff in ejectment claims the title under the person who was an executor of the will and propounded it for probate, and where the defendant is one of several caveators; but the record of the court is not evidence to show what the decision was on the validity of the will. *Ib.*
5. Whether two or more signatures, which purport to be the signatures of different persons, are or are not written by the same person, is a proper subject of proof by an expert; though the testimony of an expert on such a subject is a dangerous kind of evidence. *United States v. Darnaud*, 143
6. Witnesses may be examined in equity suits, *ore tenus* as at common law. The right so to examine them is given by the 80th section of the Judiciary act of 1789, and has never been taken away in any manner. *Sickles v. The Gloucester Company*, 186

EXPERTS. See EVIDENCE, 2, 5.

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FEDERAL AND STATE JURISDICTION. See COMITY JUDICIAL; CONSTITUTIONAL LAW; WEIGHTS AND MEASURES.

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FORECLOSURE.

The jurisdiction of a chancellor to order a foreclosure or sale of mortgaged land depends on the place where the land is situated, not on the domicile of the owner of the equity of redemption. *Elliot v. Van Voorst et al.*, 299

"FOREIGN CITIZEN OR SUBJECT." See ALLEGIANCE.

FORGERY.

Proof of forgery derived only from knowledge of handwriting, though very strong indeed, ought not to control positive, unimpeached evidence of an actual execution. *Turner v. Hand*, 86

FRENCH MARINE LAW.

Its provisions authorizing a compulsory sale of vessel or part owners are part of the general admiralty law, and binding on our courts. *The Seneca*, 895

GRANDCHILDREN.

May sometimes be included in the term children. *Ingraham v. Meade*, 32

"HARMONY SETTLEMENT," THE. See COMMUNITIES in THE COMMUNITY.

ILLUSORY APPOINTMENTS. See **POWERS.**

The English equitable practice of setting aside certain appointments under a power as illusory is apparently not known as part of the jurisprudence of Pennsylvania. *Ingraham v. Meade*, 32

INJUNCTION. See **EQUITY**, 1-4; **PRACTICE**, 8, 14-17.**INSANITY.** See **Last Will and Testament.**

Distinguished in the case of a testator, from great eccentricity and folly, the same not extending to the management of business. *Turner v. Hand*, . . . 88

INSURANCE. See **AGENCY.**

1. When insurance by a *time* policy is made on a vessel then in her home port, seaworthiness at the time of the ship's sailing is an implied warranty, though it would not be implied that the vessel was seaworthy at the moment of effecting insurance in case of a time policy made on a vessel "lost or not lost," in a distant ocean, and of whose situation or condition the owner could know nothing at the moment he was making this insurance. *Rouse v. The Insurance Company*, 367
2. The distinction between a vessel in her home port, and which, before she sails, the owner has it in his power to render seaworthy, and one in a distant ocean, where neither party can know what her condition is, nor how far the seaworthiness which she had when leaving her home port, may have been destroyed or impaired by storms encountered after her departure, and over which the owner may have little or no control, is one which, from motives of public policy, should be strictly enforced. *Id.*

INTERPRETATION, RULES OF.

1. Deeds, however apparently formal, must be interpreted upon a view of the whole paper, and in subservience to what appears to be the scope of them, especially when it appears, as it often does in the United States, that the instrument is the production of an ignorant scrivener, who has used legal terms without exact knowledge of their legal import. The technical rules of the old English books must be applied with intelligence: and only after an examination of the whole deed. *French v. Brewer*, . . . 346
2. In the case of obscure instruments, especially on motions for a preliminary injunction, a court may inquire into the actual state of the knowledge which the parties to it had upon the subject of it; and where it involves questions of science, may refer to the state of public knowledge or that of learning at the time the deed was made, *Id.*

JUDICIAL COMITY. See **COMITY, JUDICIAL.****JURISDICTION.** See **ALLEGIANCE**; **CONSTITUTIONAL LAW**, 1; **UNITED STATES.**

The jurisdiction of a chancellor to order a foreclosure and sale of mortgaged land depends on the place where the land is situated not on the domicile of the owner of the equity of redemption. *Elliot v. Van Voorst et al.*, . . . 299
 Counties may be sued in the Federal Courts. *McCoy v. Washington county*, . . 381

LACHES.

Ten years from the time an involuntary disability of infancy is removed, "stales" a case not originally the best; and this is not altered by the fact that the cumulative disability of coverture was incurred after the involuntary one of infancy had ended; voluntary disabilities, even when not cumulative, not being received in equity as a defence to the charge of staleness. *Bedilion and Wife v. Seaton*, 279

LAST WILL AND TESTAMENT. See **EVIDENCE**, 2, 5; **FORGERY.**

On a question of the memory and mental capacity of a person to make a last will and testament the court should look to his substantial business acts more than to his conversations, or occasional doings not connected with business. The fact that he is eccentric, excitable, passionate and very nervous;—is on certain subjects believed by many to be insane, through excited feeling—that he believes in spiritualism, the book of

LAST WILL AND TESTAMENT—continued.

Mormon, or in Fourierism; may talk very much like a fool; have visions and believe in them, is not enough to show a want of sound and disposing mind and memory, provided he attends constantly to his business and manages it with capacity, care and skill; and in respect of other practical matters appears to be of sound mind. *Turner v. Hand*, 88

LAW.

The supremacy of the law of the land asserted over a community in the community seeking to regulate all its concerns by a system of law of its own, and which professed to be founded on the government of the patriarchal age united to the community of property adopted in the days of the apostles. *Nachtrieb v. The Harmony Settlement*, 66

LIFE ESTATE. See ESTATE.**LIMITATIONS, ACTS OF. See LAQUES.**

The act of limitations of New Jersey, limiting the right of entry on lands to twenty years, provides that in case of certain disabilities, the time during which the person who shall have the right of entry, shall be under any such disability, shall not be taken or computed as part of said period of twenty years. *Held*, that when the statute has once begun to run, it will continue to run over all subsequent disabilities. *Den ex dem. Roberts v. Moore*, 293

MANDAMUS. See PRACTICE, 4.**MARINE HOSPITAL TAX. See CANAL BOATS, 2.****MARSHALLING OF ASSETS.**

Where an annuity left by will is charged "on real and personal estate," and legacies are also given, but are not charged on any special fund; equity will, as against heirs who are not at the same time devisees, order the annuity to be paid out of personalty, if there be personalty enough to pay both annuities and legacies; or if there be not enough to pay both, and the annuity has been already paid out of personalty, will subrogate the legatees to the annuitant. *Allen's Heirs v. Allen's Executors*, 289

MASTER AND SERVANT.

The court confirming its decision in the case of *Smith v. The Creole and Sampson*, 2 Wallace, Jr., 485, applies more strongly the doctrines of that case; and holds that when even small vessels, as coal heavers, are in tow, the towing boat is the servant of the vessel towed, and that the tug, being thus bound to obey the orders of the other vessel, is not responsible, though, in point of fact, giving orders to her, for damages in proper course of its employment. *The Steam Tug Sampson*, 14

MENTAL CAPACITY. See LAST WILL AND TESTAMENT.**MUNICIPAL BONDS. See PREVENTIVE AND REMEDIAL JUSTICE DISTINGUISHED.**

1. Where a county is authorized by statute to issue bonds, but is subjected to certain restrictions in limitation of its power; and, disregarding the limitations, issues them absolutely payable to bearer, and they pass into the hands of a *bona fide* holder for value, who has bought them in the market in the course of trade, the county is liable on them. The court will in such case not look behind the face of the bond, nor inquire whether the bonds have been issued with all the forms prescribed or not. *Wood v. Allegheny county*, 287
2. A county may be sued in the Federal courts. *McCoy v. Washington Co.*, 181
3. Where bonds issued by a county in order to aid the construction of a railroad, covenant to pay to the holder thereof, the county is liable directly to the holder, who may sue in his own name, notwithstanding as between the railroad company and the county it is agreed that the company shall pay the bond. *Id.*

MUNICIPAL BONDS—*continued.*

4. So, too, the holder, if otherwise entitled to sue in the Circuit Court may sue there, although the bonds were issued to a railroad in the same State as the county was, and which, therefore, could not have sued in the Circuit Court. *McCoy v. Washington County*, 381
5. The act of the Pennsylvania Legislature, of 12th April, 1851, authorizing Washington county to subscribe to railroads, having been declared constitutional by the Supreme Court of that State, is to be regarded in the Federal courts as constitutional, and the action of the county commissioners in conformity therewith is binding on the county. *Ib.*
6. The Constitution of the United States does not forbid States or counties from borrowing money and giving proper securities therefor, and such securities are not bills of credit within the meaning of the Constitution. *Ib.*
7. Nor is a law authorizing them, a law impairing the obligation of a contract, or one violating the fundamental principles of "republican government" within the meaning of that instrument. *Ib.*
8. Nor is the bill which finally becomes such a law, "a money or revenue bill," within the meaning of the constitution of Pennsylvania, which requires such bills to originate in the House of Representatives. *Ib.*
9. The coupons to coupon bonds payable to bearer are to be taken in connection with the bonds to which they are annexed, and though, not themselves, in the form of instruments negotiable by the law merchant, nor payable to any particular person, on his order, or even to bearer, they yet partake of the instrument to which they are attached, and when it is negotiable they too pass by delivery and become, from established usage, sufficient to establish the indebtedness of the county to the holder. *Ib.*
10. The possession of the coupons of coupon bonds, is *prima facie* evidence that the holder of them is holder of the bond, or at least was so when they were cut off, and as such entitled to receive the interest; and they may be declared on without in any way declaring on the bond from which they have been cut. *Ib.*
11. The effect of the bond cannot be varied by parol testimony. *Ib.*
12. Nor is it necessary in a suit on bonds, authorized by statute to be issued by a county subscribing to railroad stock, to show an actual subscription in the manner prescribed by the statute, or that a certificate of railroad stock issued. It is enough if the bond has been delivered in payment of a subscription authorized, and when the bond recites that it issued in such payment, the presumption is that it did so, and that the county got, or can get, a certificate. A county cannot plead negligence of its own agents, in the management of its own business to avoid payment of its obligations. *Ib.*

NATURALIZATION. See ALLEGIANCE.

NEGOTIABLE INSTRUMENTS. See MUNICIPAL BONDS, 1, 9, 10.

NEW JERSEY. See ADVERSE POSSESSION, 2.

NEW TRIAL OF FEIGNED ISSUE. See PRACTICE, 10, 11.

OBLIGATION OF CONTRACTS. See CONSTITUTIONAL LAW, 2.

Illustration of a law of New Jersey impairing the obligation of one in that State. *Martin v. The Somerville Company*, 206

PARTNERSHIP PROPERTY.

In a social partnership, where an absolute community of property with right of survivorship, on the one hand, and care, by the community, of every member, through life, on the other, is the fundamental and pervading principle; if one member be unjustly expelled by an usurped though unquestioned authority, not having under the clear terms of the association any right to expel him, the court will not oblige him to return to the association (there not being on its part an offer of full and satisfactory reconciliation and reception), but will interfere with the fundamental and pervading principle of the society; and though the expelled member brought

PARTNERSHIP PROPERTY—continued.

nothing into the community, will give to him, for himself, a separated and individual part of the property. And where payment for the party's services at the ordinary rate of services like his—during many years that he was a member—would give to him more than his numerical proportion or share of the whole capital stock, and where the question of profits was a little obscure, the court regarding this as the simplest and most natural justice, gave to him his numerical share or proportion of the whole capital stock, from whatever source arising, as the same existed at the time he was expelled, irrespective of the amount which he found in the association when he became a member. *Nachtrieb v. The Harmony Settlement*, . 66

PART OWNERS OF SHIP.

Where two equal joint owners of a ship, differing as to which of the two was entitled to appoint the master, there being no difference between them, as to the destination of the vessel, and one of them insisting to undertake a voyage in person, as master, in opposition to the will and equal rights of the other part owner, the other applied by petition, asking either for the sale of the joint property, so that he might be permitted to send the vessel to sea under a master of his own appointment; *held*, that a sale of the vessel ought to be decreed. *The Seneca*, 395

PASTOR AND PARISHIONER. See CONFIDENTIAL RELATIONS.**PATENT. See ACCOUNT, EQUITY, 1-4; PRACTICE, 12-17.**

1. A patent obtained by an alien upon an oath, ignorantly or inadvertently made, that he is a citizen of the United States, is void; and not voidable only. The true representation of citizenship is a condition precedent to the issue of the patent. *Mini's Assignee v. Adams*, 20
2. Such a mistake does not fall within such "defective or insufficient description or specification" as will allow the commissioner, under § 13 of the patent act of July 4th, 1836, to receive a surrender of the old patent and grant a "reissue." *Ib.*
3. Neither has that officer any such inherent or judicial power as will, independently of the act, enable him to grant a reissue in correction of the applicant's mistake; nor power of any kind to grant an original patent eight years after the invention patented had been in public use. *Ib.*
4. A patentee may hold a close monopoly of his right, and if he does so, the court will restrain by injunction any persons using it. Or he may grant out his entire right. But he cannot divide his right into parts, and grant to one man the right to use it in its connection with or application to one class of subjects, and to another man the right to use it in its connection with or application to another class, to such an extent as that purchasers from any of these persons may not use the fabric purchased exactly as they like, and if they please in violation of what he has supposed were rights not granted by him. *Washing Machine Company v. Earle*, 320

PENNSYLVANIA. See EQUITY, 8; MUNICIPAL BONDS, 5-8; POWERS, 2.

Her statute of 1806 preventing suits by course of the common law when a statutory remedy is given, does not enjoin it seems, to remedies in equity. *Mason v. The Boom Company*, 252

PHILADELPHIA WHARVES.

A wharf at Philadelphia may be used by its owners for the unloading of his own vessels to the exclusion of others, unless twenty-four hours' previous notice has been given of the intention to occupy it; the wharf being vacant when the notice was given. *The Volusia*, 375

PLEADINGS. See ACTION.

Form and requisites of a declaration in a prosecution under the act of Congress of May 15th, 1820, for being engaged in the slave trade. *United States v. Darnaud*, 143

POLICY OF INSURANCE. See INSURANCE.

PORT OF PHILADELPHIA. See WHARVES.

"PORTING THE HELM." See COLLISION, 2.

POSTMASTER. See SURETIES.

POWERS.

1. A power to appoint "*among such of the children of R. & M. and in such proportions as M. may appoint,*" is an exclusive power; that is to say M. may entirely exclude certain children if she pleases. *Ingraham v. Meade*, 83
2. The English equitable practice of setting aside certain appointments as illusory, it seems is not known as part of the Pennsylvania jurisprudence. *Id.*
3. A power of appointment among *children* in terms, may include *grandchildren* if in a general way grandchildren are manifest objects of the trust. And in the case before the court, though *children alone* were mentioned as entitled to receive under *appointment*, yet as *the issue* of children were, by the same clause, provided for in *defect* of appointment, it was held that the latter provision transfused its virtue in a manner to the former one; and that such issue was meant to be included within the power of appointment also. *Id.*
4. Although the donee of a power may not do indirectly that which it is unlawful for him to do directly, yet where the donee has exercised the power, without any agreement with the party in whose favor it in terms beneficially operates, that such party shall apply its benefits in the manner unlawful for the donee to direct, the simple fact that such party has voluntarily, and without any knowledge of what the donee intended to do, applied or agreed with a third party so to apply them, is not enough to make the appointment a fraud and void. *Id.*

PRACTICE. See REMOVAL OF CASES, 1-4; EQUITY, 1-4.

I. AT COMMON LAW AND GENERALLY.

1. Domicile or citizenship, need not, in a dilatory plea, be sworn to as of knowledge, nor otherwise than as of belief. *Ewing v. Blight*, 134
2. It is irregular for the court to instruct the witnesses generally, or even a single witness generally, that they were not bound, in answer to questions which might be put to them, to make any answers which would criminate themselves. The proper way is to wait until a question is asked, which, if answered in one way may criminate the witness, and for the court *then* to interfere. *United States v. Darnaud*, 143
3. A judgment in ejectment by default for want of a plea, without a rule to plead and thus putting the defendant in default, is irregular; and this whether the suit be brought in the way usual in the State courts of Pennsylvania, and now allowed by rule of court, in the Federal Court of the Third Circuit, or whether it be brought in the English way formerly used and still allowable in this court. *Paterson v. Evans*, 215

II. IN ADMIRALTY.

4. The Circuit Court has no power to issue a mandamus to the District Court, to compel it to set aside its decree in admiralty, or to grant a rehearing, or to allow an appeal after the time has elapsed in which it might have been taken; not even in cases where this court thinks that the District Court should have reheard the case, or allowed an appeal under the circumstances. *The Enterprise and The Napoleon*, 58
5. In a question of collision between a "tow" on the one side, and a steam tug and a steamboat on the other, where it is difficult for the owner of the tug to ascertain who has been in fault, the owner of the tow may "implicate both vessels, demanding a decree against one or both, and thus compel them to interplead and settle the question of their respective liabilities;" and he need not run the risk of losing his suit first against the tug, because her owner can show that the steamer was in fault, and then against the steamer, because her owners can show, upon new evidence in their power, that the tug was in fault. *Id.*

PRACTICE—continued.

III. IN EQUITY.

6. It is not requisite in equity suits in the Third Circuit, that a dilatory plea be filed within four days after the term to which the bill is filed. On the contrary, such a plea may be entered at any time before or on the next rule day succeeding that of the defendant's appearance; there being no distinction in this respect between dilatory pleas, and any other pleas. The case is different at law. *Ewing v. Blight*, . . . 134
7. Where in such suit a plea is filed, though filed irregularly, the complainant cannot treat it as a nullity and take a decree as *pro confesso*. Before taking such a decree in such a case, he should first obtain an order to set the plea aside, or to take it off the files as irregular. *Ib.*
8. Chancery will not grant an injunction, nor appoint a receiver pending a plea to its jurisdiction; but to guard against the abuse of dilatory pleas, or any irreparable mischief, the court will order an immediate hearing or trial of the plea. *Ewing v. Blight*, . . . 139
9. Under the practice of the courts of the United States, as fixed by the judiciary act of 1789, a party may examine or cross-examine witnesses *ore tenus* in equity suits as well as in suits at common law; the power given him in this respect by the 80th section of that act, not being taken away from him by any subsequent act, nor by the 67th rule of practice for the courts of equity promulgated on the 2d of March, 1842, nor in any other manner. *Sickles v. The Gloucester Company*, . . . 186
10. A motion for a new trial of a feigned issue, directed by a court of chancery, must be heard on the merits of such issue singly, and cannot be affected by the equities arising on the bill and answer. *Cohen v. Gratz*, . . . 379
11. A motion for a new trial of such an issue, must be disposed of before the cause will be heard on bill and answer. *Ib.*
12. Equity will not interfere by injunction in questions of trade marks between the vendors of patent medicines, the same being quack medicines. *Heath v. Wright*, . . . 141
13. The Federal courts, sitting in equity, cannot, under the act of July 4th, 1836, § 14, treble the damages found by them for violating a patent right, as they may, when sitting at law, and on a verdict and judgment. *Litlington & Co. v. Jones & Co.*, . . . 330
14. Wherever a defendant in equity—not alleged to be insolvent or likely to become so—presents, by answer or otherwise, a case which shows a *bona fide* issue in fact or law, or a *prima facie* right to continue his manufacture, founded on a decree of the patent office and a consequent public grant, the court will give a preliminary injunction, even in favor of a prior patentee, holding a patent for the same general purpose, only when there is a clear mistake of some sort. This kind of process being, in fact, an execution before judgment, is to be used cautiously. *Goodyear v. Dunbar*, . . . 310
15. However, if there is doubt in the case, as there naturally is, when the two patents are for the same general purpose, the court will commonly direct the defendant to keep an account. *Ib.*
16. In a bill for infringing a patent the defendants were allowed, under special circumstances, and there being no laches, to strike out an admission in their answer, that they had made certain articles, their making of which the complainant was seeking by the bill to enjoin. *Morsehead v. Jones*, . . . 306
17. The equity for an account in patent and copyright cases, is not, in the courts of the United States, a mere incident to a right to injunction; however this be by the rules of English chancery. In our courts the right to an account may exist, and an account be directed where there can be no injunction; as *e. g.*, where the term of the patent has expired before the final hearing of the case. *Blank v. The Manufacturing Company*, . . . 196
18. Where after the death of the parties promising, a bill is brought to obtain the benefits of a verbal promise made by two brothers to a third one then dying that they would give his real estate to his natural child, the executor's or administrator's of the two brothers must be made parties. As the promise in view of the statute of frauds, does not make a trust which adheres to the land, it is not enough to file the bill against the heirs of the brothers alone. *Beddilan and Wife v. Seaton*, . . . 279

PREVENTIVE AND REMEDIAL JUSTICE DISTINGUISHED.

A court will frequently issue process to prevent acts being done on the ground that they are unauthorized, which same acts, after they are done, the court will enforce as having been made in pursuance of authority sufficiently given. *Ex. gr.* It will hold a county bound to pay bonds actually issued and negotiated by it under an authority assumed from an ambiguously and ill expressed statute, although had any citizen of the county applied for an injunction to restrain the issue on the ground of want of authority clearly given by the statute, the court would have granted such preventive remedy. *Woodhull v. Beaver County*, 274

PRIEST AND PEOPLE. See CONFIDENTIAL RELATIONS.

PROVISO. See CONSTRUCTION OF STATUTES.

The rule that if a proviso to a grant be repugnant to the grant itself, the grant is good and the proviso only void, is to be taken in certain cases with some modification and may be even reversed in the case of a proviso to the cunningly drawn body of a statute; the former preserving certain rights to the State, and the latter granting them away. *Mason v. The Boom Co.*, . . . 252

PUBLIC LAW.

Sailing with a clearance to another and open port directly to a blockaded port, with directions to ascertain *at this last port*, if it is still under blockade, and if found so to be, to get the ships register endorsed, and to go to the other and open port, is a violation of the law of blockade, and exposes the vessel to seizure and condemnation accordingly. *The Admiral*, 361

"QUACK MEDICINES."

Equity will not interpose by injunction in a question of trade mark, in a quarrel between the patentees of. *Heath v. Wright*, 141

REFORMATION OF AGREEMENTS. See EQUITY, 6.

REGISTRY OF SHIP

at the custom house is insufficient proof of citizenship of the owner on an indictment for being engaged in the slave trade. *United States v. Darnaud*, 143

REHEARING. See PRACTICE, 10, 11.

REISSUE OF PATENTS. See PATENTS, 1-3.

REMAINDER. See ESTATE.

REMEDIAL AND PREVENTIVE JUSTICE DISTINGUISHED.

See PREVENTIVE AND REMEDIAL JUSTICE DISTINGUISHED.

REMOVAL OF CASES.

1. In ejectment, under the now usual American form, in which the fictitious lease, &c., is abolished,—where the tenant in possession, who *has* been served as defendant, does *not* fall within the description of persons authorized to remove a case from the State courts to the Federal, but the landlord who has *not* been made a party *does* so fall—such landlord cannot by any means that, under existing laws, can be devised, remove the case from the State court into the Federal. *Ex parte Turner*, 256
2. If tenants in common, some of whom belong to a State in which the suit is brought, while others do not so belong, sue a party who does not so belong, such defendant it seems cannot remove the case at all. *Id.*
3. To be able to remove a case from the State courts to the Federal, under the 12th section of the judiciary act of 1789, each defendant—no matter how numerous the defendants may be—who have been properly served with process, or who voluntarily appear without having been so served, must be either an alien or a citizen of a State other than that of the State to which

REMOVAL OF CASES—*continued*.

- the plaintiff belongs. It is not enough that one defendant or any—the largest number short of the whole—be so. *Ex parte Girard*, 263
4. If one defendant be an alien and be properly served or be otherwise in court, and other persons, not aliens or citizens of a State or States other than that to which the plaintiff belongs, be named as defendants in the writ, but be not served, nor appear voluntarily, the alien defendant who is served, may himself remove the case. *Id.*

REPUGNANCY. See CONSTRUCTION OF STATUTES, 1, 2.

RIPARIAN RIGHTS. See WHARVES.

SAILING VESSELS AND STEAMERS. See COLLISION, 1.

Their respective obligations when approaching. *The Steam Tug Sampson*, . . 14

SEAWORTHINESS.

The fact that a vessel runs in a fog, and in calm weather, upon a well known cape, is strong proof of her unseaworthiness, and not rebutted by the admitted fact that she was perfectly new, well built, well rigged and well manned, and in charge of a captain of reputed skill and experience. The conclusion remains that her compass had not been sufficiently tested, or that she was not well commanded, in fact, and for either of these wants she would be unseaworthy. *Bazin v. The Steamship Company*, 229

SHIPS REGISTRY. See CUSTOM HOUSE REGISTRY.

SLAVE TRADE.

Prosecutions under the act of May 20th, 1820, for being engaged in the form of the declaration, and the proofs requisite in them considered and passed upon. *United States v. Darnaud*, 143

SOCIAL PARTNERSHIP. See COMMUNITY ~~in~~ THE COMMUNITY.

STATE AND FEDERAL JURISDICTION. See COMITY, JUDICIAL; CONSTITUTIONAL LAW, 1; WEIGHTS AND MEASURES.

STATUTES, CONSTRUCTION OF. See CONSTRUCTION OF STATUTES.

STATUTES OF FRAUDS.

A mere verbal promise, though a solemn promise, by heirs at law—two brothers—to convey property as these heirs had declared to their dying brother that they would convey it—will not be looked on favorably as taking a case out of this statute, even though the promise was actually coupled with comforting assurances to the dying brother as to his health, and with remonstrances by which his wish to make a will may have been controlled or even prevented; there being no proof of fraud in the case. *Beddilan and Wife v. Seaton*, 279

STEAM TUGS. See COLLISION, 3; PRACTICE, 5; MASTER AND SERVANT.

Are not liable as common carriers for the safety of vessels which they are towing, or of their cargo. *The Enterprise and The Napoleon*, 53

STEAMERS AND SAILING VESSELS. See COLLISION, 1.

Their respective obligations when approaching. *The Steam Tug Sampson*, . . 14

SUBROGATION. See MARSHALLING OF ASSETS.

SUBSCRIPTION BY COUNTIES TO RAILROADS. See MUNICIPAL BONDS.

SURETIES.

Under an act of Congress which provides that if defaults in rendering quarterly accounts is made *at any time* by a postmaster, and the United States shall fail to institute suit for two years after such default, then the sureties shall not be held liable, the sureties of a continuously defaulting postmaster are wholly discharged, unless the United States sue within two years after the *first* default made. Institution of suit within two years from the time when the *last* default was made is insufficient. *The United States v. Marks's Sureties*, 358

TESTATOR. See LAST WILL AND TESTAMENT.

TIME POLICIES OF INSURANCE. See INSURANCE.

"TON." See WEIGHTS AND MEASURES.

The number of pounds in, as fixed by general and common usage, cannot be changed by State legislation, and the "resolutions" of traders, to the prejudice of the rights of dealers. *The Miantinomi*, 46

"TOW." See MASTER AND SERVANT; PRACTICE, 5.

TRADE MARKS.

Equity will not interfere by injunction in quarrels about trade marks between the vendors of patent medicines; being quack medicines. *Heath v. Wright*, 141

TRUST CLEAVING TO LAND.

A fraudulent promise, verbal merely, by two brothers to a third one then dying, that they would give his real estate to his natural child, does not present the case of a trust which adheres to land, in the possession of persons having notice; but only that of a contract of which chancery would compel the execution. *Bedülan and Wife v. Seaton*, 279

TUG BOATS.

Are not Common Carriers. *The Enterprise and The Napoleon*. 58

UNITED STATES.

1. The rights of the United States Government, as a sovereign, and its prerogatives as such, being but co-extensive with the functions of government committed to it, when it purchases land within a State, not intended for forts, arsenals and other national uses, but merely to secure a debt, it takes the land as any other corporation, and cannot claim any of the immunities or prerogatives of a sovereign. *Elliot v. Van Voorst et al.* 390
2. Consequently, a mortgagee may have a valid decree in chancery in a State Court for the sale of the mortgaged land, where the United States is owner of the equity of redemption, on a notice given in any manner the court may prescribe; the jurisdiction of the chancellor to order such a sale depending on the place where the land is situated and not on the domicile of the owner of the equity of redemption. *Id.*

WEIGHTS AND MEASURES.

1. The regulation of weights and measures having been given by the Constitution to Congress, it is doubtful whether the enactments of any State on that subject are of any validity whatever; even though Congress have wholly neglected to attend to this regulation. *The Miantinomi*. 46
2. When parties contract for any material by weight, using terms that have come to us from times past, with a definite meaning, such as "tons,"—which have been commonly regarded as meaning 2,240 lbs.,—the mere fact that a State has undertaken to regulate weights and measures and, in discharge of such an office, has fixed the ton at 2,000 lbs., will not dispense with an obligation to furnish the old measure. *Id.*

WHARVES.

By the law of the port of Philadelphia no vessel has a right to occupy a wharf without the permission of the owner of the wharf, unless twenty four hours' previous notice has been given of an intention to occupy the same, vacant when the notice was given. *The Volusia*, 375

WILL, LAST.

See ESTATE; EVIDENCE, 2, 4; LAST WILL AND TESTAMENT.

WITNESS. See PRACTICE, 2, 9.

ERRATA.

Page 32. Case of *Ingraham v. Meade*. At the end of the first line of syllabus, after the word "trustees," insert "for his wife and children." The Syllabus is given correctly in the Index, *supra* p. 412, title Equity, 6.

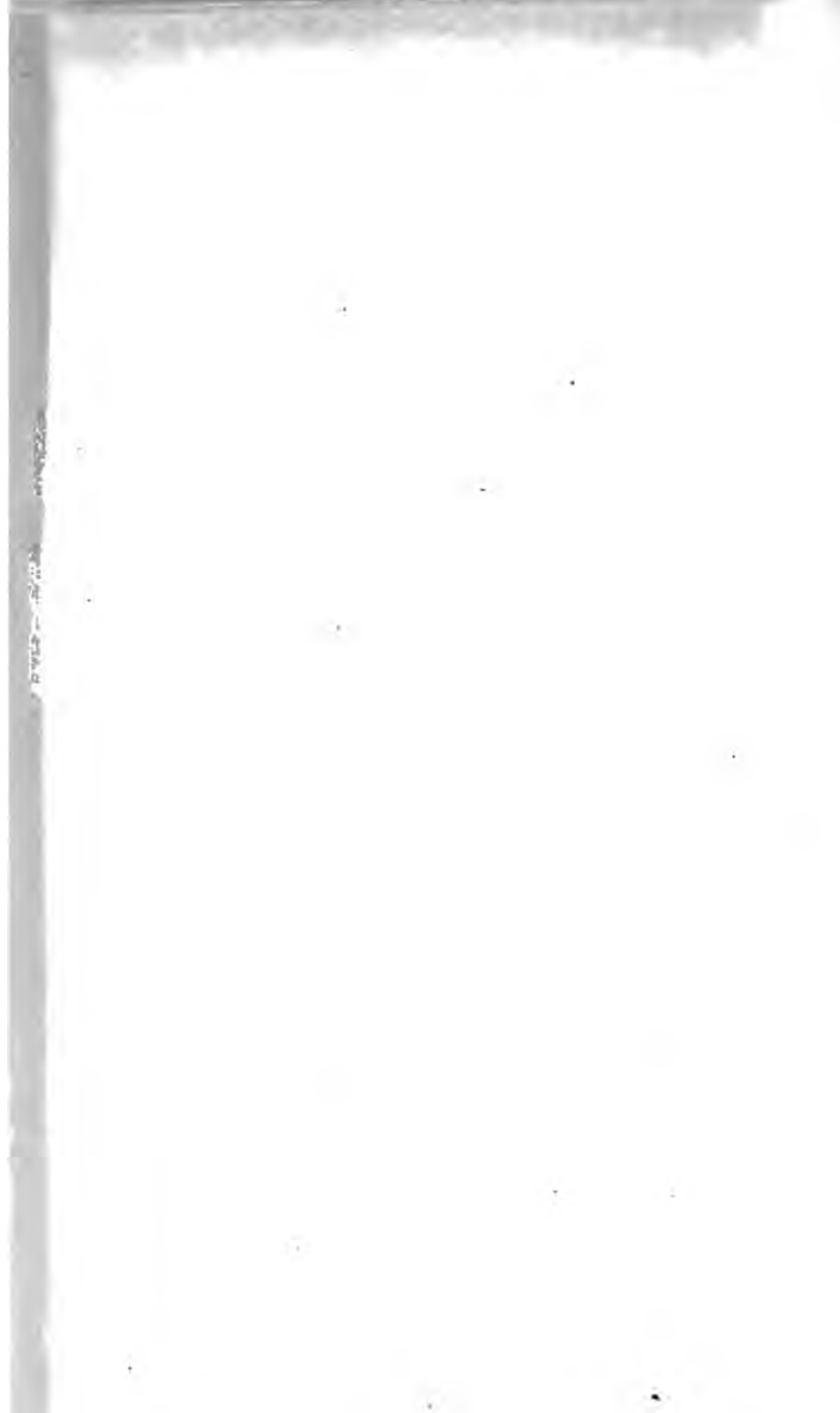
The reporter should, perhaps, here say that the preceding volume was put through the press in the summer months of 1871, and while he was engaged in preparing also for publication, and seeing through the press, the 11th volume of his Reports of the Supreme Court of the United States, and of re-editing and putting through the press, with Mr. Justice Hare, a new and much enlarged edition of the American Leading Cases. It will not be surprising, he hopes, if under work so laborious,—done in so short a term, some of it at a distance from home, and in a season of the year most oppressive—trivial errors, of more kinds than one, should be found, by the reader criticising at his leisure, to have escaped the reporter's observation as he went along.

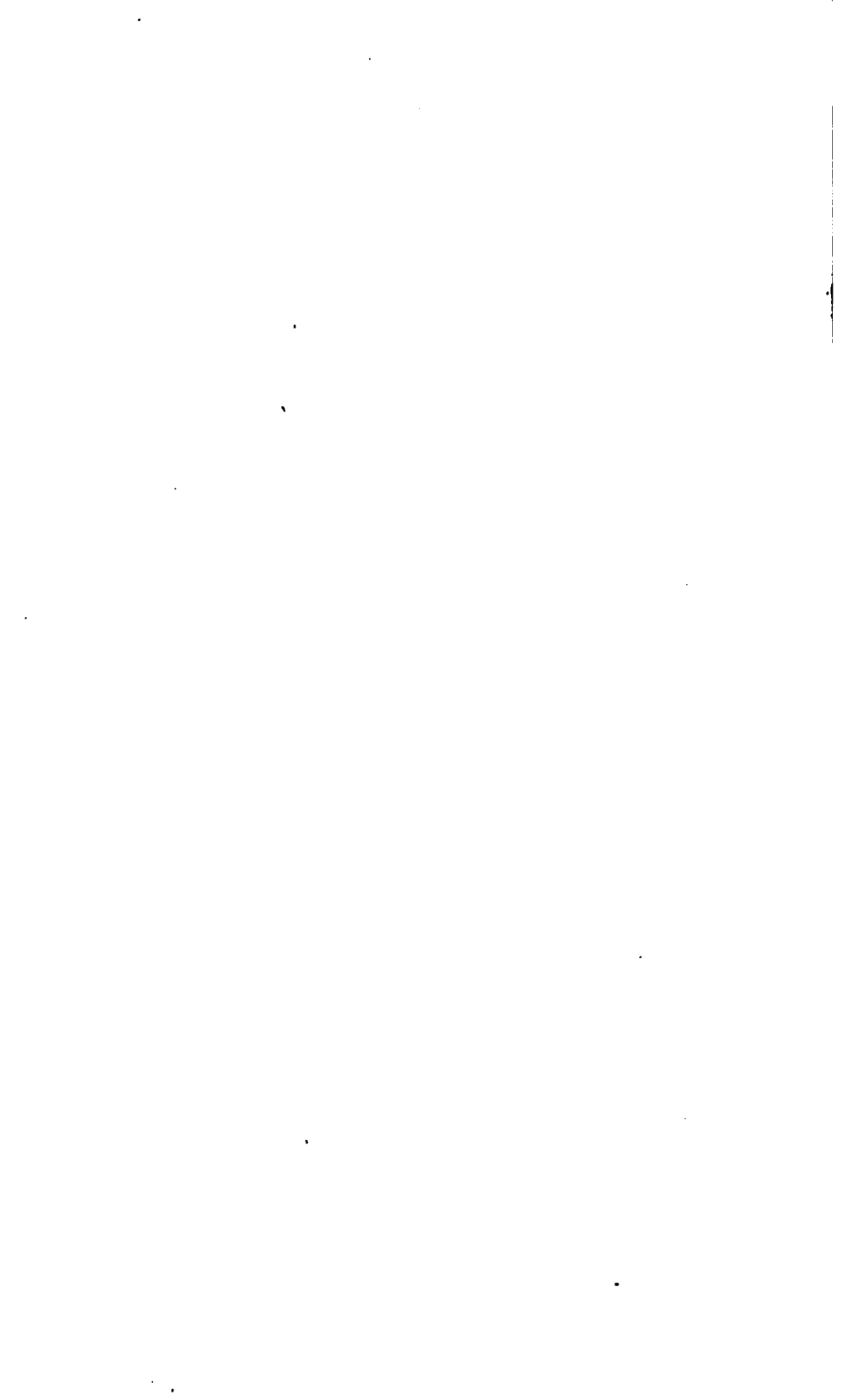












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